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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 286.

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as executors of the last will and testament of J. HARSEN PURDY, deceased,

Plaintiffs in Error,

vs.

MARK EISNER, Collector,

Defendant in Error.

BRIEF ON BEHALF OF STATE OF MINNESOTA, SUBMITTED BY ITS ATTORNEY GENERAL AS AMICUS CURIAE.

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STATEMENT.

In the case above entitled there has been drawn in question the constitutionality of the act of Congress of September 8, 1916, (39 Statute 777), gen-

erally known as the Estate Tax Act, and its validity has been assailed upon several grounds, among others, upon the ground that the act "attempts to levy a tax upon the operation of the laws of the several states, and to diminish and impair the exercise by the several states of their exclusive constitutional right to control and regulate the administration of the estates of decedents."

The state of Minnesota will necessarily be affected by the decision of this court upon the question raised by the ground of attack above quoted. It is not interested in the discussion of any other grounds of alleged invalidity of the law. Hence, this brief submitted on behalf of the state will be limited solely to a discussion of the proposition whether or not the act in question by its operation and effect, so far invades the field of its exclusive jurisdiction in the matter of successions, as to burden, interfere with or impair its power of regulation in that field.

There is, of course, no thought or intention on the part of the state to claim or contend here that because the power of regulation of successions is vested in the states, the United States may not tax transfers of property effected by death. The power to do so on the part of the Federal Government is fully acknowledged so long as its exercise is so provided for as not to invade the powers of the states' regulation, which for obvious constitutional reasons, must remain forever inviolate.

Were it possible, by any reasonable construction of the act, to so restrict its operation as to avoid the results here complained of, there would, of course, be no valid objection to this act on the part of the state, but because we believe that a serious invasion of the state's exclusive right of regulation is inevitable if the act is to be given the operation intended by Congress, we deem it our duty to submit to the serious consideration of this court the contentions upon which this conclusion is reached, knowing full well that this Court would not hesitate to protect and preserve inviolate the reserved power of the states involved in the operation of this act.

ARGUMENT.

Before undertaking to show the operation of the act in question it is well to call the attention of the Court to some of the well settled principles of constitutional law which bear directly upon the solution of the main question here, and which may be summarized as follows:

First: The Federal Government is supreme within the scope of its delegated powers, and the State governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them and that when these supreme functions are exercised by the Federal and State governments within their respective limitations, they never come into conflict.

Second: But if either government enacts a law upon a matter which is within the exclusive concern and power of regulation of the other, the validity of such law depends upon the supremacy of the power by which it was enacted.

Gibbons vs. Ogden, 9 Wheat. 1, 199-205.

License Cases, 5 How. 504-588.

Third: The United States, not possessing, as the States do, the right to regulate successions, when the United States calls into play its taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to

be measured solely by the scope of the taxing power conferred by the constitution.

Knowlton vs. Moore, 178 U. S. 41.

Fourth: While the taxing power of Congress extends to all usual subjects of taxation, including receipt or transmission of property occasioned by death, yet its power to tax, cannot be so exercised, in the constitutional sense, as to impose burdens on the exclusive power of the states to regulate successions.

Knowlton vs. Moore, 178 U. S. 41, 59, and cases cited.

Fifth: Whether an exercise of the taxing power by Congress, as manifested by the act in question, does or does not burden or impair the States' power of regulation of successions, depends upon the operation and effect of the act as enforced, and not upon the manner in which the taxing scheme has been characterized.

Western Union Teleg. Co. vs. Kansas, 216 U. S. 1.

Galveston vs. Texas, 210 U. S. 217.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196.

2. Difference between "Estate Tax Act" and the Act involved and construed in Knowlton vs. Moore, pointed out.

Before discussing the application of the principles above stated, it is proper at the outset to examine the salient provisions of the Estate Act in question, which give rise to the main question under consideration. The full text of the act will be found in the appendix at the end of this brief.

By section 201 of the Act, a tax equal to certain percentages of the value of the net estate to be determined as provided in Section 203, is imposed upon the "transfer of the net estate" of every decedent dying after the passage of this act.

By Section 202 the value of the gross estate is determined by including the value at the time of his death, of all property wherever situated, to the extent of the interest of the decedent at the time of his death, which, after his death, is subject to the payment of the charges against his estate and the expenses of his administration, and is subject to distribution as a part of his estate; including also any interest of which the decedent had, at any time, made a transfer, in contemplation of death or to take effect at death, and also to the extent of any interest of certain jointly held property.

By Section 203 it is provided that for the purposes of the tax, the value of the net estate shall be determined by deducting from the value of the gross estate, certain amounts for funeral expenses,

administration expenses, claims against the estate, etc., and a specific exemption of $50,000.

By subsequent sections a tax is made due and payable within one year after the decedent's death, and penalties are provided for its non-payment within due time. The executor is required to make a return to the collector containing certain detailed information as to the value of the estate, the deductions allowed by the act and the value of the net estate, and the Commissioner of Internal Revenue is by law directed to make all assessments of the tax under the authority of the existing provisions of law relating to the assessment and collection of taxes. The executor is required to pay the tax to the collector, and the collector is required to grant to the person paying the tax duplicate receipts which shall entitle the executor to be credited and allowed the amount of such tax by any court having jurisdiction to settle his accounts.

By Section 208, if the tax is not paid within 60 days, the collector is required to bring suit for the enforcement of the tax and by said section it is provided that "it being the purpose and intent of this title that so far as is practicable, and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution."

By section 209, it is provided that the tax shall be a lien for ten years upon the gross estate of the decedent and by subsequent sections all general provisions of law for the assessment and collection

of taxes are made applicable, and the commissioner of internal revenue with the approval of the Secretary of the Treasury, is directed to make such regulations as he may deem necessary to carry out the provisions of said act.

A cursory examination of the Act reveals the fact that the tax is imposed upon the "transfer of net estate," *without reference to the persons to to whom the property passes, or the amount of benefit taken by them, but is levied indifferently, whether they are relatives of the decedent or strangers in blood, and without reference to any settled policy of any state in the regulation of successions.* It seizes upon the net estate *en masse*, as a unit for taxation, graduated according to the value of the entire net estate, *and the tax does not at all depend upon the way in which the property passing becomes distributed upon the death of the owner.*

That such is the manifest intention of the act, is confirmed by the Regulations No. 37, promulgated pursuant to the provision of the act, reading as follows:

> "ARTICLE I. Neither a property nor a legacy tax. The Federal Estate Tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate not any particular legacy, devise, or distributive share. It is not an individual in-

heritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs.

"ARTICLE 11. Nature of transfer.—The statute embraces transfers by will or under the intestate laws, and also transfers made by the decedent in his lifetime, when made in contemplation of death or intended to take effect in possession or enjoyment at or after his death. The statute also enumerates certain special cases not strictly of either character just described. The practical test of the existence of a taxable transfer is whether the statute directs that the property in question be included in the gross estate.

ARTICLE 46. (Which has reference to the deductions authorized by Sec. 203 of the Act); * * * 'No estate, succession, legacy or inheritance tax is deductible.'"

and by the state decisions where the question was directly involved.

In re Hamlin, 226 N. Y. 407, 124 N. E. 4; 7 A. L. R. 701 and note.

Plunkett vs. Old Colony Trust Co., 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 696.

Knight's Estate, 261 Pa. St. 537-538.

In the cases above cited, the courts, construed the act as one imposing an "Estate Tax" as distinguished from any inheritance or succession tax; that is

to say, that the tax is on the interest that ceased by reason of death, and not on the interest to which some person succeeds at death.

The distinction between the character of the two kinds of taxes was clearly pointed out in the case of *Knowlton vs. Moore*, 178 U. S. 41, where the court quoted approvingly from Hanson's Death Duties; referring to the estate duty imposed by the English finance Act of 1894:

> "What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

And in sustaining the tax in the *Knowlton* case, as a tax on passing of a legacy, to be measured by the value of each separately determined legacy or share, the court, in rejecting constructions of the act, which would measure the tax upon each legacy by the whole value of the personal estate, said:

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

The court will observe that in the respect referred to this act is fundamentally different from any state inheritance tax law, or any federal law here-

tofore existing. It is unique in the feature of imposing a tax upon the estate itself, instead of on each distributive share. It seems to have been framed without any reference to prior federal or state legislation on the subject. In whatever aspect regarded, it is obvious that the act is radically different from the one considered and involved in *Knowlton vs. Moore*, 178 U. S. 41.

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3. Application of certain principles made in *Knowlton vs. Moore*, discussed and analyzed.

In this connection, and before proceeding more in detail with the question of the effect of operation of this act upon state's power, it is proper here to consider the application of principles upon which the decision in *Knowlton vs. Moore*, was rested, as against the objection that the tax there involved, burdened the states power of regulation.

The consideration of the *Knowlton* case seems also desirable at this point, because it is believed that the opinion of the court in that case has been misunderstood and misinterpreted.

The *Knowlton* case, in our view, has been decided with due regard for the principles of constitutional law stated at the head of this argument, and the argument here is founded upon the application of the same principles, respecting the limitations of powers of respective governments, as were discussed in that case.

At the outset it should be observed that in the *Knowlton* case, the tax was not an "Estate Tax," but a tax on "legacies and distributive shares." In the Knowlton case the subject of taxation was the "transmission or receipt of property occasioned by death," and the argument of counsel that the tax there imposed cast a burden upon the state's exclusive power of regulation was based upon the assumption that the tax on the "transmission or receipt of property occasioned by death" is imposed on the exclusive power of the state to regulate, overlooking the important circumstance, as stated by Mr. Justice White in the opinion, that "the thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the *transmission or receipt*, and not the right existing to regulate."

The fallacy of that argument was clearly pointed out by Mr. Justice White in his opinion (178 U. S. 59-60). This fallacy consisted in the assumption that the two governments finding exercise of their powers through measures of the same description, must come in collision solely because the subject matter of the tax imposed by Congress was at some time or some point within the state power of regulation, overlooking the important fact, that at some point the power of the states to regulate becomes expended and regulation ceases, and that thereupon an object or a subject arises which is introduced through the medium of the states power of regulation and becomes open to the taxing power of Con-

gress. That this must be so is clearly evident from the conclusion drawn in the opinion in the course of which Mr. Justice White said (178 U. S. 69):

> "Certainly a tax placed upon an inheritance, diminishes to the extent of the tax, the value of the right to inherit or receive, but this *is a burden cast upon the recipient*, and not upon the power of the state to regulate."

In reaching this conclusion, the court first conceded that the power of regulation resides in the states and not in Congress, and that Congress may not interfere with nor burden an exclusive power of the states. It must be obvious therefore, that the tax was sustained in the Knowlton case, solely upon the principle of the recognition of the state's power of regulation, *as a factor in the transmission or the receipt of the legacy*, and that the power of Congress to tax successions, may be given full play, only at the point when the power of state regulation has ceased. The application of the same principle is illustrated by a variety of cases in this court, involving validity of state enactments, obnoxious to the exclusive power of Congress to regulate interstate commerce, or inhibiting the states from taxing imports.

Gibbons vs. Ogden, 9 Wheat. 1, 199-205.
Brown vs. Maryland, etc., 12 Wheat. 419,
Welton vs. Missouri, 91 U. S. 275.
Leisy vs. Hardin, 135 U. S. 100.

In *Brown vs. Maryland*, supra, the court, while recognizing the difficulty in drawing the line of

distinction between the restriction upon the power of states to lay a duty on imports, and their acknowledged power to tax persons and property, (saying that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them) laid down the principle that the power of one government to tax cannot be brought into play, until the power of regulation of the other has been so far expended, as to introduce a new taxable object open to both.

So in *Welton vs. Missouri*, supra., this court denied the validity of state enactment levying a tax on sale of goods, upon the ground that it was a tax on the goods themselves and was therefore a burden upon the interstate commerce, and that the exclusive power of Congress to regulate commerce extended to and protected the goods from state taxation even after the property had entered the state, and until it has mingled with and become a part of the general property of the country.

So in *Leisy vs. Hardin*, 135 U. S. 100, supra., a law of the state of Iowa which forbade the receipt of an imported article, or its sale, was held in violation of the power of Congress to regulate commerce; that such power protected the property until it was received at the destination and sold in original packages and that to hold otherwise, is to burden the commerce.

Many other cases familiar to the court may be cited to the same effect, but the principle enunciated in all of them, which bears directly upon the reasons for the decision in Knowlton case, is precisely the same. That principle is that with reference to any usual subject of taxation, when the exclusive power of one government to regulate the particular matter shall have been exhausted or expended, the power to tax may extend to both governments to such a new subject. It is only when the principle considered is thus viewed that the respective powers of the two governments, having no claim to identity, and between which no analogy may be drawn, may find expression, each within its proper sphere, and have operation to the attainment of its own particular ends, without conflict nor interference by one of any right or authority of the other.

Thus it is, that when the court found in the Knowlton case by the application of the principle last discussed, that the "transmission or receipt of property by death" was the usual subject of taxation open to both governments, the conclusion was inevitable that no burden was cast upon the state's power of regulation. But the finding by the court that the burden was cast upon the recipient and not upon the state power could be justified only upon the theory that the states power of regulation was in no way involved in the particular subject of the tax; or that the power of states regulation no longer extended to the particular subject, or,

that the rights or privileges with which the power of the state had concern, had found consummation in the subject taxed before the incidence of the tax. In other words, the finding of the court that the burden was cast upon the recipient was not the reason for finding that no burden was cast upon the state, but a necessary conclusion from the previous determination that "transmission or receipt of property occasioned by death" was at the time of the incidence of the tax a usual subject of taxation upon which, the power of regulation of the state has been consummated. Upon no other theory is it possible to reconcile the Knowlton case with the principles of constitutional law. If the question of the invasion of the exercise of an exclusive power of one government by the other was to be tested, by the determination of the sole fact of the burden of the tax falling upon the persons immediately concerned then such cases as *Brown vs. Maryland*, *Western Union vs. Kansas*, *Galveston vs. Texas*, were all wrongly decided. Thus the argument in Brown vs. Maryland, that the burden was on the importer because he must pay the tax, in Western Union vs. Kansas, that the burden was on the telegraph company because it must pay the tax, or in Galveston vs. Texas that the burden was on the Railway Company because it must pay the tax, and that therefore no burden would be conceived to be cast upon the power of Congress to regulate interstate commerce, should have prevailed, but in each of those cases the fallacy of such

argument was exploded and the question of the invasion or burden of the exclusive power of the federal government was determined by other considerations in conformity to the principles above referred to.

It must be conceded in any event, that had the court found in the Knowlton case that the act there involved was a burden upon the power of the state regulation of successions, the decision of the court would have been the other way, which makes obvious the conclusion that the Knowlton case is not an authority for the proposition that Congress can tax transfers of property effected by death, regardless of the effect of such taxation upon the state power of regulation. On the contrary, in reaching the conclusion as the court did, that the burden was cast upon the recipient and not upon the state power, the decision stands as an entirely consistent authority for the proposition that Congress cannot so tax successions as to cast a burden upon the states exclusive power of regulation. It should not be overlooked in this connection that the conclusion of the court as to the casting of the burden upon the recipient was of the very essence of the decision, is put beyond doubt by the dissenting opinion of Mr. Justice White in Snyder vs. Bettman, 190, U. S. 249-258, where referring to his conclusion in the Knowlton case, that the burden was cast upon the recipient and not upon the states power, he said: "This conclusion was absolutely essential to the construction of the statute in Knowlton vs. Moore."

Now the very question for decision here is whether a burden is cast upon the power of the state to regulate successions, and this question cannot be answered merely by saying, that because in the Knowlton case, it was held that no burden was cast upon the state, therefore no burden can be said to be cast upon the state by the act under consideration.

As already noticed, the acts are radically different, and are designed to have wholly different operation; therefore, while the Knowlton case is decisive on the question of casting of burden by the act there considered, it did not involve the question as to whether a tax levied by Congress upon the mass of the estate, regardless of its destination, and in utter disregard of any state policy of regulation of successions, can be said to be a valid exercise of the taxing power of Congress, when the operation and effect of the act is shown to have direct effect upon the state power. In other words, when the court decided in the Knowlton case, that the tax was upon the "transmission or receipt of property occasioned by death," *thus giving full effect to state power of regulation, by which a new object was introduced, open to taxation by Congress*, the conclusion that no burden was cast upon the state power was inevitable, since no burden upon state power could be conceived, when the object of taxation was found not to be a subject of the state's power of regulation, when intercepted by the tax.

4. THE QUESTION OF BURDEN OF STATE POWER OF REGULATION OF SUCCESSIONS MUST BE DETERMINED BY THE MODE OF THE IMPOSITION OF THE EXACTION, AND ITS OPERATION AND EFFECT AS ENFORCED, AND NOT BY MERE NAME OR CHARACTERIZATION OF THE PARTICULAR TAX.

Here the subject of the tax and the manner of its imposition, being radically different from that involved in the Knowlton case, the question whether the act does impose a burden or interfere with the state power of regulation, must be determined by the effect and operation of the act as enforced and not by the name given to the tax, and if in the manner and effect of its operation, it is shown to impair, interfere with or burden the state's power of regulation, then the act cannot be regarded as a lawful exercise of the taxing power of Congress, and its invalidity cannot be saved by the mere name or characterization which the act gives to that particular tax.

That this is the true test to be applied to the act in question is illustrated by the many cases decided by this court, involving the validity of state enactments, with respect to their operation and effect, as a burden upon the power of Congress to regulate interstate commerce.

The subjects of taxation in all these cases, are generally either the privileges of exercising corporate franchises within the state, or the property employed in their business—all usual subjects of

taxation, within the acknowledged taxing power of states. Yet, because of the exclusiveness of the power of Congress to regulate commerce being involved, this court invariably looked beyond the particular characterization of the tax, and determined the question of the burden on comerce power, *by the operation and effect of the act as applied and enforced*, and not by the name given to the tax.

Western Union Telegraph Co. vs. Kansas, 216 U. S. 1;

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196;

Philadelphia & S. Mail S. S. Co. v. Pa. 122 U. S. 326;

Meyer v. Wells, Fargo & Co., 223 U. S. 298;

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217;

Fargo v. Hart, 193 U. S. 490;

International Paper Co. vs. Massachusetts, 246 U. S. 135;

Looney vs. Crane Co. 245 U. S. 178;

Kansas City vs. Botkin, 240 U. S. 227.

As was said in Kansas City, F. S. & M. R. Ry. v. Botkin, 240 U. S. 231, in discussing whether a state exaction burdened the interstate commerce power of the national government:

> "In determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon

the manner in which the taxing scheme has been characterized."

And again, in Mugler v. Kansas, 123 U. S. 623:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, and under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority."

In Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217, 227, which involved the validity of Texas Statute, imposing an annual tax equal to one per cent of gross receipts on each railroad lying wholly within the state, the court, in condemning the statute said:

> "Neither the state courts, nor the legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect."

Again in Ashley v. Ryan, 153 U. S. 436, the court said:

> "Whether the charge be viewed as a tax, a license or a fee, if its exaction violated the interstate commerce clause * * * or involved the assertion of the right of a state to exercise its powers of taxation beyond its limits, it was void, whatever might be the technical character affixed to the exaction."

Again in St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 363, the court said:

> "We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced."

It thus appears that in considering the question of burdening the state power of regulation by the act in question, it is not so important to look at the name given to the tax by the act, as it is important to look into the operation and effect of the act, as it bears upon the State's exclusive power of regulation. But, manifestly, before the operation and effect of the act, can be properly exposed to view, we must first ascertain the function, scope and extent of the state power in question, so as to intelligently inquire whether and to what extent it is or will be burdened or interfered with, by the federal enactment in question.

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5. THE SCOPE AND BOUNDARIES OF STATE POWER OF REGULATION.

Upon this phase of the question, what was said by Chief Justice Marshall in Gibbons vs. Ogden, *supra*, in defining "regulation" is in point:

> "To regulate implies in its nature full power over the thing to be regulated; it excludes necessarily the action of all others that would perform the same operation on the same thing." * * * A regulation when adopted is designed for the entire result, and the production of a uniform whole."

This court will notice judicially that at the time of the pasage of the Estate Act, Congress found the several states in the exercise of their respective powers of regulation, by the enactment of laws, intended to operate upon the devolution of property effected by death. In doing so, each state has the exclusive right to prescribe the conditions, attach privileges or grant exemptions, as it sees fit, to the exercise of the right to transmit or to receive property on death.

That such regulation, in whatever form it may be exercised by each state, is designed for the entire result and the production of a uniform whole is but a necessary deduction from the nature of the power itself; and that such power must be allowed full exercise, without interference of another government, for the consummation of its purpose, is of the very essence of the power itself.

That the power to regulate descent and succession of property on death is a sovereign power, and belongs exclusively to the states, is so well attested by a variety of cases decided by this court, that it seems unnecessary to do more than to cite a few of them by way of illustration.

United States v. Fox, 94 U. S. 315.
Yonley v. Lavender, 21 Wall. 276.
Chanler v. Kelsey, 205 U. S. 466.
Blackstone v. Miller, 188 U. S. 189.
Maxwell v. Bugbee, 250 U. S. 525.
Tilt v. Kelsey, 207 U. S. 43.
United States v. Perkins, 163 U. S. 625.
Mager v. Grima, 8 How. 490.
Byers v. McAuley, 149 U. S. 608.

Manifestly, if regulation is designed "for the entire result and the production of uniform whole" as stated by Chief Justice Marshall in the Gibbons case, then the boundaries of that power must be co-extensive with the attainment of such entire result, and since the power is admittedly both sovereign and exclusive, the state may impose any conditions it sees fit, in the exercise of that power, before the designed result is produced, without interference or embarrassment by another government. Hence it is that this court has repeatedly said, that the so-called succession or inheritance tax enactments by several states was but an exercise of the power of regulating the devolution of property by death.

Mager v. Grima, 8 How. 490.

Magoun vs. Illinois Trust Co., 170 U. S. 283, 289, 290.

Carpenter v. Pennsylvania, 17 How. 456.

United States v. Perkins, 163 U. S. 625.

The point we wish to make here is that death duties, under whatever name, imposed by the several states, while in some aspects may be regarded as taxes, exacted in the exercise of power of taxation, yet in their essence, as attested by the cases decided by the court, all such laws may be and are generally sustained, as manifestations of the exclusive power of regulation. This consideration is important, as marking sharply the boundaries between a *mere power to tax* (possessed by Congress in the matter under consideration) and a tax by a

state imposed as a measure adopted in the exercise of a sovereign power of regulation. The distinction between the two makes obvious the limitations of the federal government to *tax* "usual subjects of taxation" in the exercise of taxing power and a like measure adopted by a state in the exercise of its power of regulation.

The cases cited in support of the proposition that a state succession or inheritance tax, is but a measure adopted in the exercise of the power of regulation, are all illustrations of the application of the same principle in another line of cases involving the reverse proposition, namely, that of the encroachment of the state power to tax "usual subjects of taxation" upon subjects which at the time, are within the exclusive power of Congress to regulate. In all such cases as already noticed, this court has never hesitated to condemn the tax by whatever name, or combination of words, it might have been characterized, as soon as it found that the particular subject attempted to be taxed by the state, was at the time subject to the regulating commerce clause. Among the large number of cases already cited on the proposition just mentioned, this court in *Philadelphia & Southern Steamship Company vs. Pennsylvania*, 122 U. S. 326, where the right of a state to tax gross receipts of an interstate steamship company was involved, and was defended upon the ground that the tax was not on commerce, did not hesitate to say:

"It cannot be pretended that the state could constitutionally regulate or interfere with that

commerce itself. *But taxing is one of the forms of regulation. It is one of the principal forms.*" 122 U. S. 326, 336.

That statement by the court is pertinent here, not only as indicating that taxation is one of the principal forms of regulation, but also that taxation by way of regulation belongs *exclusively* to the sovereign possessing the power of regulation, and may not be usurped or interfered with by another government. Further illustrations of such regulation by way of taxation may be found in that line of cases decided in this court (collected in 12 Corpus Juris, p. 98 Sec. 128) where a tax by a state was attempted to be exacted upon property while in transit from one state to another. This court invariably condemned the tax, whether the tax is laid by the state of origin, or the state of destination, upon the ground that in one case the protection of the commerce clause has attached, and in the other such protection has not ceased.

It being manifest that regulation of successions is designed as well as exerted to produce certain results, it must deal with all the property within the state's dominion. It is designed to define and specify the rights of those who succeed to property in death, and the proportion each shall take, as well as to impose conditions on such taking, and while revenue is an incident to such regulation, it is obvious that the ultimate object of the power, is to define and determine the manner, the tenure, and the conditions upon which all property within the

state's jurisdiction may be acquired or received on the occasion of death.

It is inconceivable that the results thus to be produced in the exercise of exclusive regulation can be produced by a sovereign government otherwise than by entire freedom of action, and as this power of regulation from its very nature is brought into exercise at the very point of death, its exclusiveness and freedom of action begins at that point, and must obviously continue until the specific rights and interests of the successors are produced and defined, in accordance with rules prescribed by such regulation. Therefore, "the interest that ceases on death" is the primary thing with which the power deals, and the right or privilege of the owner to transmit it on death, or the exercise of that right, is the very first step in state regulation, or the inception of regulation.

For the federal government to step in and impose an exaction at any point between the inception of regulation, and until the full rights of successors are defined and produced, is, on principle, just as much an usurpation of the power as it is for a state to impose a tax upon property *in transit* from one state to another, whether such tax is laid by the state of origin or the state of destination.

6. THE EXACTION ATTEMPTED TO BE IMPOSED BY THE ACT OF SEPTEMBER 8TH, 1916, WHETHER CONSIDERED AS ATTACHING TO THE INTEREST THAT CEASES AT DEATH, OR AS ATTACHING TO INTEREST TO WHICH SOME PERSON SUCCEEDS AT DEATH, BY ITS OPERATION AND EFFECT AS ENFORCED, IS A FORM OF REGULATION OF SUCCESSIONS, AND DIRECTLY INTERFERES WITH AND CASTS A BURDEN UPON STATE POWER OF REGULATION.

As already noticed, in determining the question whether the exaction here has such relation to, or bearing upon, the state regulation of succession, as to amount to exercise of the power prohibited to Congress, we must regard the operation and effect of the exaction, and not the name by which the taxing scheme has been characterized. In this aspect, therefore, it is not important whether the exaction is by the act intended to attach to the interest that ceases at death, or to the interest to which some person succeeds on a death, if in either case by its manner of imposition and enforcement, it operates as a form of regulation of successions, or interferes with or burdens the paramount power of the state regulation.

It is manifest in any aspect, that the exaction imposed by this Act is some kind of a death duty which concerns property of a decedent, but its imposition, accrual and enforcement is not postponed to the time of the ascertainment or emergence of

any specific beneficial interest in successors, and in this respect as already noticed, it is radically different from any federal death duty heretofore considered by this court. What then is the operation of this act?

By Section 201, the tax is levied upon the "transfer of net estate" which is specifically defined in subsequent sections, solely by reference to the value of the estate, after making certain deductions, without reference to the persons to whom the property may pass, and in utter disregard of the amount of benefit taken by them, or any of them, and without reference to any conditions or exemptions imposed upon or granted to the successors by the particular policy of the state. Nowhere in the act is there any recognition of the distribution of the estate, whether by will or under intestate laws, and the amount of the tax is not made to depend upon how and to whom the estate is to be distributed.

The imposition of the tax is not postponed to the completion of administration, but on the contrary the time of its payment is fixed solely by reference to the time of death (section 204). Again its payment is required to be made by the personal representative (section 207), and if not paid, "the property of the decedent" is to be sold under decree of court for the satisfaction of the tax. (Section 208). By the same section, the intent is clearly expressed, that the "undistributed estate" shall bear the burden of the tax, "it being the purpose

and intent of this title that so far as practicable and unless otherwise directed by the will of the decedent, the tax shall be paid before its distribution." Thus it would seem that in one view the tax is imposed upon the "estate" of the decedent, "the interest that ceases on death" and not upon legatees or devisees. This view was taken by several state courts where the controversy arose as between legatees and residuary beneficiaries as to whether this tax fell upon the estate or upon the particular legatees or devisees.

Re. Hamlin, 226 N. Y. 407; 7 A. L. R. 701 and notes.

Plunkett vs. Old Colony Trust Co., 233 Mass. 471; 7 A. L. R. 696.

Knight's Estate, 261 Pa. St. 537.

Some courts have also decided that this tax being imposed upon the estate of the decedent, and being payable out of net estate, is no part of the estate at the time of its distribution, but is a charge or expense against the estate, before distribution.

Corbin vs. Townsend, 92 Conn. 501.

People vs. Pasefield, 284 Ill. 450.

State vs. Probate Court, 139 Minn. 210.

People vs. Northern Trust Co. 289 Ill. 475; 7 A. L. R. 709 and notes.

See Contra:

Estate of Week, 169 Wis. 316.

Re. Sherman, 166 N. Y. Sup. 19; (affirmed 222 N. Y. 540).

Looking then upon the mode of imposition and enforcement of the exaction here, as being one in total disregard of any transfer to the successors or legatees, but directly upon the "net estate" as defined by the Act, then manifestly it amounts to nothing else than a *direct* tax on property, and void for want of apportionment commanded by the constitution.

If, on the other hand, by giving some effect or meaning to the words "transfer," the exaction be viewed as one not upon the transfer to the *beneficial* successors, but upon the transitory or intermediate transfer from the decedent to the executor or administrator which takes place on death, then clearly the exaction would be objectionable as a tax upon the state itself, or upon its instrumentalities.

The transfer of the estate to the executor or administrator, if it can be regarded in any sense as such, is not a transfer to them of any beneficial interest, but a transfer solely in trust for the purposes of carrying out the regulations of the state in that behalf prescribed. "The legal effect of granting letters testamentary or administrative is to place the whole estate, real and personal, within the custody of the law and leave it there until the administration has been completed."

Yonley vs. Lavender, 21 Wall. 276.

Byers vs. McAuley, 149 U. S. 608.

In that view, the personal representative is nothing more nor less than an instrumentality of the

state for the purposes of carrying out its regulations.

Tilt vs. Kelsey, 207 U. S. 43, 55.

In fact this intermediate transfer to the personal representative, cannot be viewed otherwise than as a transfer required and commanded by the laws of the state in the exercise of its sovereign and exclusive power to regulate and control the descent and distribution of the estate, as shown by a variety of cases.

Tilt vs. Kelsey, 207 U. S. 43.

Wall vs. Bissell, 125 U. S. 382.

Byers vs. McAuley, 149 U. S. 608.

This transitory transfer, as the court will observe, of the "interest that ceases on death" is the very initial step in the administration of every estate, by the exercise of the state regulation, and upon which every subsequent preceeding in the state regulation is founded. A tax upon such transfer cannot be regarded otherwise than as a tax upon the state agency or instrumentality provided by its sovereign will, and is obviously objectionable under our dual system of government.

Collector vs. Day, 11 Wall. 113.

Ambrosini vs. United States, 187 U. S. 1.

Veazie Bank vs. Fenno, 8 Wall. 533-541.

Flint vs. Stone Tracy Co., 220 U. S. 107, 155.

Moreover, to view the exaction as one attaching upon the transfer to the personal representative, is

to intercept the passage of property from the decedent to the beneficial successors, at a point where the power of state regulation is in the very act of operation, and would be as objectionable, and for the same reasons that a tax by a state upon property *in transit* from one state to another, is condemned as a burden upon interstate commerce. 12 Corpus Juris, 98.

In Brown vs. Illinois, 227 U. S. 504, the court said:

> "This argument proceeds upon a misconception of the ground upon which the power to tax articles actually moving in interstate transportation is denied to the states. That denial rests upon the supremacy of the Federal power to regulate interstate commerce. Its postulate is the necessary freedom of that commerce from the burden of such local exactions as are inconsistent with the control and protection of that power. The fact that such a burden is sought to be imposed by the state of the domicile of the owner, upon property moving in interstate commerce, creates no exception. That state enjoys no prerogative to make levy upon such property passing through it, because it may belong to its citizens. They, as well as others, are under the shelter of the commerce clause. The question is determined not by the residence of the owner, but by the nature and effect of the particular state action with respect to a subject which has come under the sway of a paramount authority."

Paraphrasing the principle thus expressed by the quotation above, we say that the ground on which

the denial of the power of congress to tax the transitory passage of property while it is in the custody of the state and upon which the state power is at the time being wielded, rests, is the supremacy of the state to regulate successions.

Its postulate is the *necessary freedom* of that regulation from the burden of such federal exactions as are inconsistent *with the control and protection of that power.* The question is determined not by the name of the exaction, but by the nature and effect of the particular federal action with respect to a subject which has come under the sway of a paramount authority.

If on the other hand we look upon the exaction as one not directly upon the net estate and not upon the transitory transfer to the executors, but as an exaction upon the *transfer of aggregate beneficial interests* which the state has undertaken to effect in the successors of the decedent, the imposition cannot escape the condemnation as one casting a burden upon state power when its operation and effect as enforced are given due weight.

It will be observed at the outset, that all death duties, imposed by the various states, are by the overwhelming weight of authority regarded as a tax in the nature of a bonus exacted by the state for the privilege granted by its laws of inheritance or succeeding to property on the death of the owners. They are generally regarded as being upon the interest to which persons succeed on a death, and not upon the interest that ceases by reason of

death; such taxes are commonly called "inheritance" or "succession" or "transfer" taxes.

(See collection of cases in note to Re. McKennan, 33 L. R. A. (N. S.) 606.)

It is undoubtedly true that the taxing power of Congress, extends to and may be exercised upon "the interest that some person succeeds at death," but the imposition of the exaction must be so provided for, that the state's power of regulation, *as a factor in the transmission or the receipt of property on death*, is *first* given full play, which is but another way of saying, that the power of congress to tax does not begin or attach until the state regulation upon the particular subject had ceased, or has been so far expended as to produce a definable or ascertainable subject, no longer under the sway of the paramount power.

It was upon the application of that principle that a tax on a legacy or receipt, was sustained in Knowlton vs. Moore and Scholey v. Rew, 23 Wall. 331, and there are no federal cases holding that a federal inheritance or succession tax ever attached or became a charge against any interest, *until by the process of state regulation and by its authority*, there emerged or was introduced a subject for the exercise of federal taxing power.

But here by the manner of the imposition of the tax, and its enforcement, it is manifestly impossible to give effect to or enforce the tax, without *at the same time*, to so far disregard the states power of regulation, *as a factor in the transmis-*

sion, as to interpose the federal exaction *as a factor or a condition* in such transmission.

By intercepting the consummation of the "transfer" in the beneficiaries, as this act does, before the transfer is completed and the respective rights of the successors are defined, *as by state law commanded*, the exertion of the federal power, as manifested in the act, becomes *an intermeddling or regulating factor, or a price or a condition* of the transmission.

Measuring the tax as it does here, solely by the *mass* of the estate in its process of transmission, without reference to its beneficial destination, and in utter disregard of the state's regulations, relating to its final distribution, it manifestly *prevents* the state from performing its operation, or carrying out its sovereign will, according to its own policy.

Pertinent are the remarks of Chief Justice Marshall in *Gibbons vs. Ogden*: "To regulate implies in its nature full power over the thing to be regulated; *it excludes necessarily the action of all others that would perform the same operation on the same thing.*"

But how can the action of the federal government be deemed to have been excluded in the state regulation, when by the very design of the act, the state is prevented from performing its operation, by the intermeddling of another power, which at the same time reaches over and withdraws from that operation, and appropriates to its purposes, the very object of that operation?

Certainly a tax imposed as this one is, measured by the mass of the estate diminishes not only to the extent of the tax, the "net estate," but also the separate shares of the successors. Bearing in mind this diminution of the net estate, as well as the separate shares which must result from the enforcement of the tax in its method of imposition, the following results are inevitable:

(a) A condition or price is imposed upon the successors which must be complied with before they may take their shares in the residue.

(b) There is withdrawn from the operation of the state's power a part of the thing (net estate) which the state by its laws has conceded to the successors, as well as a part of the same thing which the state has exacted or reserved for itself.

In either case, the power of the state is thus sensibly burdened and directly invaded; (a) by imposing a condition or a price before a successor may take his share in the residue, it denies to the state its paramount right to say what shall pass to such successor, to the extent of the imposition, and (b) by withdrawing from the state regulation the part of the thing which the state has exacted for itself, it denies to the state to the extent of the tax, its paramount right to determine for itself what part of the thing shall be exacted as a condition of the transfer.

Had the exaction been measured by the value of each specific distributive share, and enforced after each such share was ascertained, or made ascertain-

able by means of state regulation, it is obvious that no burden upon or invasion of state power could then be conceived, but by the very design of the act, this is made impossible, since the measurement of the tax and the method of its imposition and enforcement, expressly forbid the taking into account of the *separate* value of each distributive share, but on the contrary the command of the act, is to measure and enforce the tax by the value of the *mass* of the estate, regardless of its destination.

A few examples by way of illustration of the operation and effect of the exaction upon the state's power of regulation may be appropriate here. Thus, looking at the table for computing the estate tax prepared by the Commissioner, (Article 8, Regulations No. 37), insofar as it applies to the act of September 8th, 1916, the following appears:

Upon an estate of $250,000 the tax amounts to $5,500.00; upon an estate of $1,000,000.00 the tax is $41,000.00; upon an estate of $5,000,000.00 the tax is $341,000.00; and upon an estate of $10,000,000.00 the tax is $841,000.00. These sums comprising the taxes are obviously parts of such several estates before their distribution in accordance with the state regulations. Obviously the withdrawal of those sums from the estate prevents the states from exercising their power of regulation thereon. In other words, the sums mentioned, representing the estate tax, and ranging from $5,500.00 to $841,000.00 never come within the sway of the state's power. It must follow, there-

fore, that to the extent of the imposition, the federal power becomes a factor or a condition in the transmission, and to that extent invades and directly burdens the exclusive power of state regulation, by denying to the state, to the extent of the imposition, its paramount right to say what shall pass to the successor, as well as by denying to the state, to the same extent, its paramount right to determine for itself what part of the estate shall be exacted for itself as a condition of the transfer or succession.

Had the act in question in express words provided—"that to the extent of the tax hereby imposed, no state shall permit the succession to property of any decedent dying after the passage of this act"—would any one then pretend that the power of states' regulation was not directly burdened or embarrassed in its operation, to the extent of such express prohibition? Would it not then be obvious that Congress had imposed a condition upon the laws of descent of every state as well as a condition upon each state's paramount right of regulation of succession or descent of property? Would anyone then pretend that such law was a valid exercise of taxing power of Congress? Why not? Obviously, because the power of regulation of successions is not within the province of the national government, but is vested exclusively in the states.

It is beyond doubt that the taxing power knows no limitations upon its exercise, when within its lawful sphere, save only the will or discretion of the legislative body, and so, here, if Congress may thus

impose its taxation upon the occasion of death, it may do so to any extent. If the power so to do be conceded, is it not manifest that by an increase of the rates to, say, fifty per cent, or one hundred per cent of the value of net estates, that the enactment must operate to inhibit to the states to the same extent and the same thing, the operation of their laws respecting devolution of property on death? Is it not apparent from mere statement, that an interdiction of the states power in such manner must be as effectual as if expressly worded as above? It is too obvious to require discussion, that whatever is withdrawn by Congress from the operation of the states power and before that power can be expended, may not come within the operation of that power.

Hence, if the mode of its imposition, operation and enforcement be given, as it must be, due weight, the exaction here operates precisely in the same way and produces the same result which would have been accomplished, had the act in question in express words contained the prohibition to the states in the words above quoted. Thus is revealed the illegality of the exaction. *In substance* the exaction is not only a tax upon transfer of property effected by death, but by its operation and effect, by withdrawal of part of the estate from state regulation it necessarily operates as a regulation of descent of property and thereby casts a direct burden upon the states' paramount power of such regulation.

The act in question presents the problem whether it and the states laws taken with respect to the regulation of the transmission of property on death, may, concurrently, have operation upon the same subject without resulting conflict.

The solution of the question requires that in considering the nature and intended operation of the Act of Congress, that due consideration be also given to the operation of such state laws, and the power given expression by them, relating to the subject with which the Act deals; and so, when it is admitted that those laws are the exercise of a paramount authority respecting the subject in hand committed exclusively to the states, and that the operation of those laws may not be interfered with by Congress, the question resolves itself into one whether the Act of Congress may have operation.

The states may not be trammelled in the exercise of their power. Thus full operation must be accorded the states laws. How then may the Act of Congress have force and effect? If its operation is to embarrass or burden the states power then it must be promptly conceded that it may not be given effect. Statutes must be interpreted, if possible, so as to make them consistent with the Constitution and the paramount law. *Presser vs. Illinois*, 116 U. S. 252.

Now, were it to be argued, that there must be ascribed to "the transfer of the net estate" the significance or meaning of *the transfer which the*

states effect in successors, it must appear from the demonstration that has been made, that, if such be the conception of what is the subject of taxation, the states are never permitted to effect transmission or the transfer to successors of that portion of of estates comprising the Federal exaction. The tax is measured by the mass of what is defined by the Act to be "net estate" and is deducted from that mass, and provision is made by the Act, Sec. 207, for the issuance by the collector of a receipt evidencing payment which "shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts." It is to be observed that what the states prescribe shall be taken by persons designated as successors, is the residue only of estates of decedents shown by the account of administration upon allowance and settlement. So that, the deduction of this tax before or at the point of the definition of what shall pass to successors clearly diminishes that which the states may pass to successors. In other words, the operation and effect of the tax, through the mode of measurement and the deduction or withdrawal of the amount from estates before the shares to pass to successors can be measured, defined or ascertained, and the deduction or withdrawal of which sensibly lessens the shares which the states may pass to successors, militates against such being the subject of taxation. Such a construction immediately exposes the tax as a condition exacted by

Congress of the states or of the successors which must be performed before the states may define or pass, or the successors may receive, the residue. The difficulty is found in the plain wording of the enactment, which by the mode of imposition and enforcement denies the conception that such is the subject of taxation. As already noticed, there is no word of recognition in the Act of persons standing as successors; nor of the relation or want of relation of successors to a decedent; nor of reference to the distribution of the estate; nor of state laws regulating the transmission and succession to property; but on the contrary the net estate as defined in the Act is seized upon as the unit of taxation and the tax thereon is graduated in accordance with its value, without regard to the provisions of state laws determining the manner property on death shall be split and divided between persons designated as successors.

This court in *Henderson v. Wickham, Mayor*, 92 U. S. 259, speaking in reference to the Act of several states requiring shipmasters to give a bond for each passenger landed by them, in the penal sum of $300 to indemnify the states against expense for relief or support of the passenger named, or alternatively to pay $1.50 for each passenger landed, held the Acts to be invalid regulations of commerce, and said:

> "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is ap-

> parent that the object of this statute as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore * * * it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers * * * as was the statute held void in the *Passenger Cases.* (7 How. 283.) * * * *The effective operation of this law commences at the other end of the voyage.* The master requires of the passenger, before he is admitted on board, as a part of the passage money, the sum which he knows he must pay for the privilege of landing him in New York. It is, as we have already said, in effect, a tax on the passenger, which he pays for the right to make the voyage—a voyage only completed when he lands on the American shore" * * *

So here whatever be considered the subject of taxation, *the effective operation of this law commences at the beginning of the voyage,* and requires toll from all that which is to pass, before the states, giving direction to the voyage, may determine what shall pass to a certain destination.

Paraphrasing what was said in *Western Union vs. Kansas, supra,* (216 U. S. on page 30), we say: Looking then at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the exaction here, is in its essence not simply a tax upon a transmission or receipt of property occasioned by death, but a form of regulation of successions as well, and therefore

a burden upon and an usurpation of the states paramount power of regulation. In other words, the subject of taxation, as actually revealed by the operation and effect of the Act, is in fact broader than the boundaries of the taxing power of Congress, and therefore cannot be regarded as a legitimate subject of taxation.

As in the *Western Union v. Kansas* case, the court, while yielding to the state its unlimited power to impose a tax upon a foreign corporation as a condition of its right to do local business in Kansas, declared the tax invalid because by its measurement and imposition, it was *based* upon something more than the business of the corporation solely within the state and thereby burdened interstate commerce; so here, while acknowledging to Congress its power to tax legitimate subjects of taxation, the exaction by the mode of its imposition, measurement and enforcement, is obviously *based* upon, and includes within it, something more than the mere transmission of property occasioned by death; to-wit: the exaction, in fact, overreaches the boundaries of that subject of taxation and by its own force and *at the same time*, operates as a regulation of descent—a subject within the sway of another paramount power and therefore prohibited to Congress.

The power to tax is the power to destroy, *McCulloch v. Maryland*, 4 Wheat. 316, which principle is pertinent only where there is no power to tax; *Knowlton v. Moore*, *supra*.

7. ANY CONSTRUCTION OF THE ACT WHICH WOULD PERMIT THE STATE TO DEDUCT ITS TAX BEFORE COMPUTATION OF THE ESTATE TAX, CANNOT AFFECT OR MILITATE AGAINST THE CONTENTION THAT THE STATES' POWER OF REGULATION OR ITS LAWS OF SUCCESSION, ARE BURDENED OR IMPAIRED TO THE EXTENT OF THE EXACTION.

If it be once conceded, as we think it must be, that by its operation, enforcement and effect, the exaction here withdraws to the extent of the tax, a part of the estate upon which the power of the state is being at the time wielded, and thereby excludes its operation to that extent, it is obvious that any construction of the Act which would merely permit the state to deduct its tax before the computation of the Estate Tax can in no way impair or militate against the soundness of the contention that even then the state's power is nevertheless burdened and denied to the extent of the exaction.

To demonstrate the soundness of this proposition, requires merely recalling to the attention of the court, the force of two considerations which bear upon this question: (a) as universally considered by the vast majority of state courts, and also by this court, the so-called "inheritance", "succession" or "transfer" taxes exacted by the states, are in reality a *bonus* or price which the state has a right to and does exact, as a condition or consideration for such inheritance, succession or transfer.

This bonus or price is exacted for the performance by the state of certain result, viz: effectuating the succession or the transfer in conformity to its laws of regulation of successions. (b) "Regulation when adopted is designed for the entire result, and the production of a uniform whole" (*Gibbons v. Ogden.*)

Bearing in mind these considerations, the validity of which cannot be disputed, the question is: how can the state produce the certain result, by the mere receipt of the consideration for it, when it is shown as here, that the performance of the very result, for which the consideration is exacted, is interrupted and burdened by the intervention of another power coming in and withdrawing from the operation of such performance, a part of the same thing upon which the state had undertaken to perform that certain result?

It is true that by such deduction, the state's exaction is satisfied, but has the state performed the result for which it exacted the bonus? Certainly not. Manifestly the result which it undertook to perform is nevertheless diminished to the extent of the federal exaction, and to that extent the law of the State has been nullified or denied.

8. THE QUESTION OF POWER IS NOT TO BE DETERMINED BY THE AMOUNT OF THE BURDEN ATTEMPTED TO BE CAST.

Were it to be contended that the Act complained of cannot be considered as casting a burden upon the states' power in a relatively immediate way, because in many or most cases the tax must be comparatively small or insignificant, the sufficient answer must be that the extent of an injury never measures the rightfulness of the act producing it. Indeed, it can hardly be claimed that a tax which withdraws from the operation of the states' power, or burdens that power in its exercise, to the extent noted in the foregoing illustrations (and materially greater under the Revenue Act of 1918 by increased rates reaching *one-quarter* of all estates in excess of $10,000,000) is or can be other than substantial, immediate and direct.

This court having occasion to consider the question of the compulsory production of the books and papers of persons charged with violation of the revenue laws of the United States, as an unwarranted search and seizure within the meaning of the Fourth Amendment, said in *Boyd v. United States*, 116 U. S. 616.

> "Though the proceeding in question is divested of many of the aggrevating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest

and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sounds than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

Again in *Fairbank v. United States,* 181 U. S. 283, which reviewed a conviction for issuing an export bill of lading without affixing thereto an internal revenue stamp of ten cents required by the Act of June 13, 1898, the constitutionality of which Act was assailed as in violation of the provision that no tax or duty shall be laid on any articles exported from any state, this court speaking in reference to the small amount of the tax, said:

"* * * The question of power is not to be determined by the amount of the burden attempted to be cast. The constitutional language is, 'no tax or duty.' A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is, '*obsta principiis*', not '*De minimis non curat lex.*'"

* * * * *

For the reasons which have been advanced, the State of Minnesota deems that Title II, Estate Tax, of the Act of Congress, September 8th, 1916, entitled "An Act to increase the revenue, and for other purposes," is an encroachment upon and interference with its exclusive power to regulate the transmission of property on death, and impedes, embarrasses and burdens the exercise of that power, and in consequence that the tax laid is in violation of its sovereign rights, and the Constitution of the United States.

Respectfully submitted,

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APPENDIX.

Provisions of the Estate Tax Act of 1916.

Estate Tax Law of 1916 (Revenue Act of 1916, Title II).

Sec. 200. That when used in this title—

The term "person" includes partnerships, corporations, and associations;

The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia;

The term "executor" means the executor or administrator of the decedent, or, if there is no executor or administrator, any person who takes possession of any property of the decedent; and

The term "collector" means the collector of internal revenue of the district in which was the domicile of the decedent at the time of his death, or, if there was no such domicile in the United States, then the collector of the district in which is situated the part of the gross estate of the decedent in the United States, or, if such part of the gross estate is situated in more than one district, then the collector of internal revenue at Baltimore, Maryland.

Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

One per centum of the amount of such net estate not in excess of $50,000;

Two per centum of the amount by which such net estate exceeds $50,000 and does not exceed $150,000;

Three per centum of the amount by which such net estate exceeds $150,000 and does not exceed $250,000;

Four per centum of the amount by which such net estate exceeds $250,000 and does not exceed $450,000;

Five per centum of the amount by which such net estate exceeds $450,000 and does not exceed $1,000,000;

Six per centum of the amount by which such net estate exceeds $1,000,000 and does not exceed $2,000,000.

Seven per centum of the amount by which such net estate exceeds $2,000,000 and does not exceed $3,000,000;

Eight per centum of the amount by which such net estate exceeds $3,000,000 and does not exceed $4,000,000;

Nine per centum of the amount by which such net estate exceeds $4,000,000 and does not exceed $5,000,000; and

Ten per centum of the amount by which such net estate exceeds $5,000,000.

Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, whatever situated:

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate.

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; and

(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

For the purpose of this title stock in a domestic corporation owned and held by a nonresident decedent shall be deemed property within the United States, and any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.

Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are al-

lowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

(2) An exemption of $50,000;

(b) In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States that proportion of the deductions specified in paragraph (1) of subdivision (a) of this section which the value of such part bears to the value of his entire gross estate, wherever situated. But no deductions shall be allowed in the case of a nonresident unless the executor includes in the return required to be filed under section two hundred and five the value at the time of his death of that part of the gross estate of the nonresident not situated in the United States.

Sec. 204. That the tax shall be due one year after the decedent's death. If the tax is paid before it is due a discount at the rate of five per centum per annum, calculated from the time payment is made to the date when the tax is due, shall be deducted. If the tax is not paid within ninety days after it is due interest at the rate of ten per centum per annum from the time of the decedent's death shall be added as part of the tax, unless because of claims against the estate, necessary litigation, or other unavoidable delay the collector finds that the tax cannot be determined, in which case the interest shall be at the rate of six per centum per annum from the time of the decedent's death until the

cause of such delay is removed, and thereafter at the rate of ten per centum per annum. Litigation to defeat the payment of the tax shall not be deemed necessary litigation.

Sec. 205. That the executor, within thirty days after qualifying as such, or after coming into possession of any property of the decedent, whichever event first occurs, shall give written notice to the collector. The executor shall also, at such times and in such manner as may be required by the regulations made under this title, file with the collector a return under oath in duplicate, setting forth (a) the value of the gross estate of the decedent at the time of his death, or, in case of a non-resident, of that part of his gross estate situated in the United States; (b) the deductions allowed under section two hundred and three (c) the value of the net estate of the decedent as defined in section two hundred and three; and (d) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Return shall be made in all cases of estates subject to the tax or where the gross estate at the death of the decedent exceeds $60,000, and in the case of the estate of every nonresident any part of whose gross estate is situated in the United States. If the executor is unable to make a complete return as to any part of the gross estate of the decedent, he shall include in his return a description of such

part and the name of every person holding a legal or beneficial interest therein, and upon notice from the collector such person shall in like manner make a return as to such part of the gross estate. The Commissioner of Internal Revenue shall make all assessments of the tax under the authority of existing administrative special and general provisions of law relating to the assessment and collection of taxes.

Sec. 206. That if no administration is granted upon the estate of a decedent, or if no return is filed as provided in section two hundred and five, or if a return contains a false or incorrect statement of a material fact, the collector or deputy collector shall make a return and the Commissioner of Internal Revenue shall asess the tax thereon.

Sec. 207. That the executor shall pay the tax to the collector or deputy collector. If for any reason the amount of the tax cannot be determined, the payment of a sum of money sufficient, in the opinion of the collector, to discharge the tax shall be deemed payment in full of the tax, except as in this section otherwise provided. If the amount so paid exceeds the amount of the tax as finally determined, the Commissioner of Internal Revenue shall refund such excess to the executor. If the amount of the tax as finally determined exceeds the amount so paid the commissioner shall notify the executor of the amount of such excess. From the time of such notification to the time of the final payment

of such excess part of the tax, interest shall be added thereto at the rate of ten per centum per annum, and the amount of such excess shall be a lien upon the entire gross estate, except such part thereof as may have been sold to a bona fide purchaser for a fair consideration in money or money's worth.

The collector shall grant to the person paying the tax duplicate receipts, either of which shall be sufficient evidence of such payment, and shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts.

Sec. 208. That if the tax herein imposed is not paid within sixty days after it is due, the collector shall, unless there is reasonable cause for further delay, commence appropriate proceedings in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still

undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

Sec. 209. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien.

If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in

money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

Sec. 210. That whoever knowingly makes any false statement in any notice or return required to be filed by this title shall be liable to a penalty of not exceeding $5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Whoever fails to comply with any duty imposed upon him by section two hundred and five, or having in his possession or control any record, file, or paper, containing or supposed to contain any information concerning the estate of the decedent, fails to exhibit the same upon request to the Commissioner of Internal Revenue or any collector or law officer of the United States, or his duty authorized deputy or agent, who desires to examine the same in the performance of his duties under this title, shall be liable to a penalty of not exceeding $500, to be recovered, with costs of suit, in a civil action in the name of the United States.

Sec. 211. That all administrative, special and general provisions of law, including the laws in relation to the assessment and collection of taxes, not heretofore specifically repealed are hereby made to apply to this title so far as applicable and not inconsistent with its provisions.

Sec. 212. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make such regulations, and prescribe and require the use of such books and forms, as he may deem necessary to carry out the provisions of this title.

Supreme Court of the United States

OCTOBER TERM, 1920

No. 286

NEW YORK TRUST COMPANY AND ALBERT W. PROSS

AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARSEN PURDY, *DECEASED*

PLAINTIFFS IN ERROR

v.

MARK EISNER

COLLECTOR

DEFENDANT IN ERROR

BRIEF ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, SUBMITTED BY ITS ATTORNEY-GENERAL AS AMICUS CURIAE

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STATEMENT.

In the above entitled case, the constitutionality of the Federal estate tax, imposed by the Revenue Act of 1916 (39 Statute, 777) has been attacked upon the following grounds, among others: — that the tax is an usurpation of the sovereign power of states to regulate descent and distribution, and that it is a direct tax and invalid because not apportioned.

The Commonwealth of Massachusetts has three reasons for being interested in the question of the constitutionality of the act, these being:

First. — That the tax being measured by the whole estate and taken out before distribution, burdens and impairs its sovereign right to regulate descent and distribution;

Second. — That the exaction is in such form that it reduces the revenues of the state as it is taken out before computing the toll which the state exacts in the exercise of its power to regulate descent and distribution;

Third. — That it represents the citizens of the Commonwealth, who are damaged in that they are unconstitutionally required to pay a larger proportion of the total amount raised by the Federal Government from this death duty than they would be required to pay if it were constitutionally apportioned, as it is a direct tax and should be apportioned among the states upon the basis of population.

ARGUMENT.

First.

The Federal Estate Tax cannot be sustained upon the Grounds on which the Succession Taxes were sustained in Knowlton v. *Moore, 178 U. S. 41, and Scholey* v. *Rew, 23 Wall. 331.*

The taxes considered in those cases were succession taxes imposed on the exercise of the right of legatees or distributees to receive a share of a decedent's estate.

The Federal estate tax imposed by the Revenue Act of 1916 is a tax upon the property owned by the

decedent at the time of his death. This distinction is recognized in numerous cases.

> Corbin *v.* Townshend, 92 Conn. 501.
> Knight's Estate, 261 Pa. St. 537.
> People *v.* Pasfield, 284 Ill. 450.
> State *v.* Probate Court, 139 Minn. 210.
> People *v.* Bemis (Colo.), 189 Pac. 32.
> State *v.* First Calumet etc. Co. (Ind.) 125 N. E. 200.
> Northern Trust Co. *v.* Lederer, 257 Fed. 812 (affirmed in Lederer *v.* Northern Trust Co. 262 Fed. 52).

In a recent California case, Estate of Henry Miller, decided January 18, 1921, the Court distinguishes the two kinds of tax thus:

"The federal tax under the act of 1916, on the other hand, is not a succession tax, but an estate tax, not a tax on what comes to the beneficiaries or heirs, but upon what is left by the decedent. In this respect it differs from the legacy tax imposed by the United States War Revenue Act of 1898. The Act of 1916 entitled the tax an 'estate tax' and in terms imposes it upon the net estate of the decedent as a unit. It is not apportioned among the various transferees and bears no relation to the separate amounts which they are to receive. The distinction between a succession tax and an estate tax is a recognized distinction, and, so far as we are aware, it has been held without exception that the federal tax, under the act of 1916, is of the latter character. It is not possible, in our judgment, to take any other reasonable view of it.

"The nature of the federal tax is discussed in *In re Roebling's Estate*, 89 N. J. E. 163, and it is said (p. 166): 'To be more precise, it is imposed upon the *estate*, transferred by death, and

not upon the *succession* resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The federal tax resembles the probate duty of the act of 1862, chapter 119 (12 U. S. Stats., p. 483), which was payable by the executor out of the estate, while the legacy duty therein provided for was payable by the beneficiaries. The tax occupies the same field of death duty as does the 'Estate Tax' in England. By the Finance Act of 1894 an estate duty is levied upon the principal value of all property, real or personal, which passes on the death of a person and is imposed upon the estate and is payable by the executor as an administration expense. In addition to this tax, there is also a legacy tax, and a succession duty upon the realty, payable by the recipients. Speaking of the death duty, Mr. Hanson in his opening chapter — Hans. D.D. (6th ed.), says:

"'The new duty imposed by the Finance act, 1894, and called estate duty, supersedes probate duty; but the key to the construction of the Finance act, 1894, and the amending act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of the death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty, which have no real connection with the subject.'"

The nature and effect of the Federal Estate tax was considered at length in the case of Woodward *et al.*, Executors, *v.* United States, decided by the Court of Claims of the U. S., March 14, 1921.

The Court, after discussing the provisions of the Federal Estate Tax Law of 1916, says:

"The various provisions thus recited seem to clearly indicate that the tax is a charge upon the estate. The statute calls it an 'estate tax'. In Knowlton *v.* Moore, 178 U. S. 41, 65, the use of the heading 'legacies and distributive shares of personal property' in the act was taken as indicative of what was in fact taxed. Here it is 'estate'. There the tax was upon the passing of legacies or distributive shares. The tax under consideration is imposed upon the transfer of the net estate. In Knowlton *v.* Moore, the statute under consideration was the act of 1898, and it was declared to mean either that the tax was imposed on the passing of the whole amount of the personal estate, or on the passing of legacies or distributive shares of personalty, determined either by the separate sum of each legacy or distributive share or by the volume of the whole personal estate. The court, speaking through Mr. Justice (now Chief Justice) White, says (p. 65): 'The statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property'.

"It must be recognized that the Congress, in considering the act of 1916, was familiar with the act of 1898, and the construction of it by the Supreme Court in Knowlton *v.* Moore. Indeed by reference to the report of the Committee on Ways and Means (Report No. 922, 64th Cong., 1st sess.), having the bill in charge, it appears that the distinction between an estate tax upon the transfer of the estate and a tax upon the shares passing to distributees or legatees was had in view by the committee. It was said 'Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.' See upon this point In re Hamlin, 226 N. Y. 407, where the court considers the proceedings in Congress upon the passage of the bill."

The Court then calls attention to various State and Federal cases in which the Federal estate tax is distinguished from the succession tax, and concludes as follows:

"It thus appears from the terms of the statute itself and its declared purpose that the estate tax is a tax which is levied upon, and payable out of, the estate in the hands of the executors, and that the authorities in some instances hold it to be a charge of administration, while all of them hold it to be payable out of the estate."

In Hanson's Death Duties (6th ed., pages 1 and 2) the author in referring to the English estate duty levied "upon the principal value . . . of all property . . . which passes on the death" of persons, says, in distinguishing the estate tax from the succession tax:

"The new duty[1] imposed by the Finance Act, 1894, and called Estate duty, as has been said above, supersedes probate duty; but the key to the construction of the Finance Act, 1894, and the Amending Acts lies in remembering that the new Estate duty *although it is leviable on property* which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. *What it taxes is not the interest to which some person succeeds* on a death, but the property in respect of which an interest ceased by reason of death. Unless this principle is clearly kept in view, the mind is constantly tempted by the wording of the Act to revert to principles of succession duty which have no real connection with the subject."

"It is leviable in respect of the property, both real and personal, which passes or is deemed to have passed on the death of the deceased." Hanson's Death Duties, page 2.

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[1] Finance Act, 1894 (57 and 58 Vict. c. 30).

This Court, in Knowlton *v.* Moore, 178 U. S. 41, 48, 77, referring to this distinction made in Hanson's treatise, said:

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered, comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds and a tax on the interest which ceased by reason of the death, *the two being different objects of taxation.*"

It is not to be supposed, however, that this Court, in recognizing this distinction, intended to say that Congress could levy a valid estate tax. In considering such question, it is obvious that the validity of an estate duty in England is wholly independent of constitutional restrictions, whereas in the United States such a tax must meet the requirements of the Federal Constitution, — and the question whether it is a direct tax or an indirect tax, and the question whether it is in its essence an encroachment upon the exclusive powers of states to regulate the devolution of property, become of vital importance.

SECOND.

The Federal Estate Tax is an Encroachment upon the Exclusive Power of the Several States to regulate the Descent and Distribution of Property of Decedents Domiciled therein, and is, for that Reason, Unconstitutional and Void.

I. The several States possess the exclusive power to regulate and control the descent and distribution of property.

In Mager *v.* Grima, 8 Howard 493, 490, this Court sustained the constitutionality of a tax imposed by the State of Louisiana upon a legacy payable to an alien. The Court (Taney, C.J.) said, concerning the power of the state to regulate the descent of property:

"Now, the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the State.

"In some of the States, laws have been passed at different times imposing a tax similar to the one now in question, upon its own citizens as well as foreigners; and the constitutionality of these laws has never been questioned. And if a State may impose it upon its own citizens, it will hardly be contended that aliens are entitled to exemption; and that their property in our own country is not liable to the same burdens that may lawfully be imposed upon that of our own citizens."

In United States *v.* Fox, 94 U. S. 315, this Court, in affirming a decree of the Court of Appeals of New York holding that a devise to the United States of land in New York was void because not permitted by laws of the State of New York, said:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick *v.* Sullivant, 10 Wheat. 202. *The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government.* The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

In Tilt *v.* Kelsey, 207 U. S. 43, 55, this Court, in considering the extent of the power of the several states in the matter of succession to property on death, said:

"When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the State, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it. Sometimes this duty is performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans', surrogate or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign may determine. *But somewhere the power must exist to decide finally as against the world all questions which arise in the settlement of the succession.* Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. As was said by Mr. Justice Bradley, speaking on this subject in *Broderick's Will*, 21 Wall. 503, p. 519: 'The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to

which they are subject. This is the foundation of all judicial proceedings *in rem'*. It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein."

"*In respect to the settlement of the successions to property on death the States of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable.*"

This Court has repeatedly asserted the principle that the United States may not interfere with the exercise by the sovereign states of those powers reserved to the states.

"Yet every State has a sphere of action where the authority of the National government may not intrude. Within that domain the State is as if the Union were not. Such are the checks and balances in our complicated but wise system of State and National polity." Farrington *v.* Tennessee, 95 U. S. 679, 685.

"The people of the United States resident within any State are subject to two governments; one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad." United States *v.* Cruikshank, 92 U. S. 542, 550.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State

governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States . . .

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved', are as independent of the general government as that government within its sphere is independent of the States." Collector *v.* Day, 11 Wall. 113, 124.

II. The Federal Estate Tax imposed by the Act of September 8, 1916, is in its operation and effect an invasion of the sovereign power of the States to regulate the descent and distribution of property of decedents.

In the consideration of this question, a helpful analogy is found in the cases affecting the Federal control of interstate and foreign commerce. These cases clearly establish the principle that any state tax affecting interstate or foreign commerce is such an invasion of the exclusive federal power to regulate as to invalidate the tax.

When the State of Kansas undertook to impose a tax on a foreign corporation engaged in interstate commerce, this Court said:

"A State may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce. This is so elementary as to require no reference to the multitude of authorities by which it is sustained." Pullman Co. *v.* Kansas, 216 U. S. 56, 65.

"And all restraints by exactions in the form of taxes upon such transportation, or upon acts necessary to its completion, are so many invasions of the exclusive power of Congress to regulate that portion of commerce between the States." Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 214.

In Philadelphia & Southern Steamship Co. *v.* Pennsylvania, 122 U. S. 326, in holding invalid a tax on the gross receipts of a steamship company engaged in interstate and foreign commerce, the Court said:

" . . . it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms." 122 U. S. 336.

In Brown *v.* Maryland, 12 Wheat. 419, this Court held a tax on the sales of an importer was a tax on the import, and in Cook *v.* Pennsylvania, 97 U. S. 566, held that a tax on auctioneers' sales of imported goods in original packages, was a tax on imports, and both were invalid, as the State taxed subjects of taxation within the exclusive power of Congress.

The validity of a statute is to be determined by its effect and operation.

"According to the well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. Henderson *v.* Mayor of New York, 92 U. S. 259, 268. If a statute by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although

the State legislature may not have intended to enact an invalid statute." Ludwig *v.* Western Union Telegraph Co. 216 U. S. 146, 162.

If the necessary operation and effect of a tax is to burden interstate commerce, the validity of the tax is not saved because the state expressly disclaims any purpose by the statute in question to obstruct or embarrass interstate commerce. Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 27.

It is submitted that the practical operation and effect of the Federal estate tax interferes with the State's power of control over decedent's estates. This exclusive power of the State begins at the instant of the decedent's death and continues until the time for distribution of the estate arrives.

In Carpenter *v.* Pennsylvania, 17 How. 456, this Court said:

"But, until the period for distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile as that where the distribution should be made. . . . The rights of the donee are subordinate to the conditions, formalities and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution."

The passage just quoted was referred to with approval in Orr *v.* Gilman, 183 U. S. 278, 285.

The power and purpose of the State's control extends to the determination of the rights of creditors of the decedent, the vesting of the decedent's property in accordance with the laws of the State governing descent

and distribution, and to the exaction of whatever price or toll the state may see fit to impose as the condition of the exercise by it of its control and administration of the decedent's estate.

"The law takes every decedent's estate into custody, and administers it for the benefit of creditors, legatees, devisees and heirs, and delivers the residue that remains, after discharging all obligations, to the distributees entitled to receive it. . . . And it is not until this work of administration is performed, that the right of succession attaches." Strode *v.* Commonwealth, 52 Pa. St. 181, 189.

The provisions of the Federal estate tax law of September 8, 1916, assume a large measure of control over the estates of decedents.

Section 200 of the Act defines "executor" as follows:

"The term 'executor' means the executor or administrator of the decedent, or if there is no executor or administrator, any person who takes possession of any property of the decedent."

Section 205 imposes on the executor so defined, the obligation within thirty days after qualifying as such executor, or after coming into possession of any property of the decedent, whichever event first occurs, to give written notice thereof to the Collector. The executor is also required at such times and in such manner as may be called for by regulations to furnish detailed information as to the estate.

Section 204 provides that the tax shall be due one year from the decedent's death, and if the tax is not paid within ninety days after it is due, interest shall be added to the tax at the rate of ten per cent from the time of the decedent's death.

Section 208 authorizes proceedings in the United States Court to enable the United States to subject the property of the decedent to be sold under judgment or decree of the Court, and authorizes the tax to be paid out of the proceedings of such sale.

Section 209 provides that the tax, unless sooner paid, shall be a lien for ten years upon the gross estate of the decedent, except such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration.

No provision in the act contains the suggestion that this Federal power of control is subordinate in any respect to that of the State. On the contrary, the Act of September 8, 1916, obviously contemplates a paramount control of Congress as to the matters therein provided.

The Bureau of Internal Revenue in certain cases assumed a certain amount of control over those in possession of the property before the State's own officers have been appointed to take possession of the same. The Act recognizes in a measure executors who have been appointed by the State's Probate Court, but it subjects them to its own rules and regulations and penalties for violation of such regulations, and provides that the Collector's receipt for the payment of the tax "shall entitle the executor to be credited and allowed the amount thereof by any court having jurisdiction to audit or settle his accounts", thus imposing an obligation upon the Probate Courts of States which both in form and in substance is unquestionably an interference with the State's own control.

The Federal estate tax obviously becomes a prior lien upon the assets of a decedent, paramount to that

of the State. In this respect, it impairs the control of the State and imposes a burden upon the State: — in the first place, to the extent of the Federal tax, the very subject matter of the State's control is diminished, and in theory at least, might be wholly destroyed; in the second place, by diminishing the amount of the estate which comes within the control of the State, it prevents *pro tanto* the collection by the State of the amount of the price or toll which the State is entitled to exact as a condition precedent to the right of the distributees to receive their respective shares of the estate.

A few illustrations of the necessary effect and operation of the law will demonstrate the extent of the interference authorized by the Act of September 8, 1916.

Example I. — Assume an intestate decedent with no surviving wife or kindred; his property escheats to the State. The Federal estate tax is in terms "imposed on the transfer of the net estate of *every person*", and the Commissioner of Internal Revenue has ruled that the tax applies to property that escheats to the State for lack of heirs.

"The Federal estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise, or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs." Art. 1, Regs. 37.

Thus where a net estate of $10,000,000 escheats to the State, the latter must pay a tax, under the 1916 law, of $841,000, and under the present law, $1,681,500. The State is required to pay a tax of from 8% to 16% upon property which is vested in the State solely by virtue of its own laws. The natural and necessary effect of this application of the estate tax is that the State is subjected to a tax upon its property in violation of the established principle that property of the several states is not subject to taxation by the Federal Government.

"The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency." South Carolina *v.* U. S. 199 U. S. 437, 456.

Example II. — Suppose a net estate consisting of personal property of $20,000,000, and a will giving specific legacies to various collaterals amounting to $16,000,000 and the residue to the testator's child.

The estate tax under the 1916 law would be $1,-841,000, and under the present law, $4,181,500. The residue of $4,000,000 given to the child would thus be reduced to $2,159,000 under the 1916 law and under the higher rates of the present law, would be wholly extinguished. Can it be said that a death duty which so alters the proportion between the several shares of distributees is not an interference with the power of the State to regulate the devolution of property?

Example III. — Suppose a net estate of $20,000,000 with real estate of $16,000,000 given to the children, and the residue, consisting of personalty, to the testator's widow.

The result is the same as in Example II. Under the present law, the widow's interest is extinguished; under the 1916 law it is reduced from $4,000,000 to $1,841,000. This results from the provisions of these laws making the tax payable so far as possible from the personal property which comes into the executors' custody.

The foregoing examples seem to show that the Estate Tax in its natural and necessary effect not merely diminishes the distributive shares, but alters the proportion between them.

In Knowlton *v.* Moore, the succession tax was sustained because it was a tax on the recipient. The government in this case says there is no difference in principle between that tax and the 1916 estate tax. It is respectfully submitted that there is this very marked difference:

The burden of the succession tax fell upon the recipient of the legacy or devise, and was measured by the value of such legacy or devise. The estate tax is generously measured by the aggregate of all the successions and may be paid wholly from the share of one of many distributees and thus establish a new devolution of the testator's property.

Since the decision in the case of Knowlton *v.* Moore, it has been settled law that when the administration of decedents' estates has proceeded to the point where the rights of distributees to receive their respective shares has been determined, the exercise of such rights to receive may be made the subject of a constitutional Federal excise tax.

The tax considered in Knowlton *v.* Moore, *supra*, was not imposed until the exercise of a State's power

of control had been so far completed that there had emerged distinct rights of distributees to receive, and the burden of the tax was cast by the exercise of those rights upon the distributees and not upon the State in the exercise of its power of control.

In Knowlton *v.* Moore, the majority of the Court, through Mr. Justice White, met the objection that the succession tax under consideration was an interference with the power of the State in the following manner:

> "Certainly, a tax placed upon an inheritance or a legacy diminishes to the extent of the tax the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate."

And later, Mr. Justice White, in his dissenting opinion, in Snyder *v.* Bettman, 190 U. S. 249, 258, referring to the passage above quoted, said:

> "This conclusion was absolutely essential to the construction of the statute in Knowlton *v.* Moore."

The Federal estate tax does not attach itself to the exercise of rights determined by the instrumentalities of the State. It attaches or may attach its burden to the estate before the machinery of State regulation has started. (Sections 200, 205, 206 and 207.)

It imposes duties, obligations and penalties upon executors appointed by the State. It diminishes the distributive shares upon which States levy their toll as the price for the devolution and administration of decedents' estates, and thus diminishes the amount of such toll or price. It alters the proportion of distribu-

tive shares in the case of estates passing by will, — in some cases destroying entirely the residuary estate. In the case of escheat, it imposes a tax upon property which has vested in the State solely by virtue of its own power of regulation, and, to the extent of the tax, removes from the control of the State a portion of the estate which is the subject matter of the exclusive and paramount control of the State.

For these reasons it is submitted that the Act of September 8, 1916, is unconstitutional and void.

THIRD.

The Federal Estate Tax is a Direct Tax and therefore Unconstitutional because not Apportioned in Accordance with the Requirements of the Federal Constitution.

The population of the State of Massachusetts, according to the Census of 1920, was 3,852,356, or 3.64 per cent of the population of the United States. The report of the Commissioner of Internal Revenue for the year 1920 shows (page 50) that during the year which ended with June 30, 1920, Massachusetts estates paid Federal estate taxes in the amount of $6,481,764, which was 6.25 per cent of the whole amount collected in the United States during the same year, approximately twice the amount that would have been collected in Massachusetts if the same aggregate had been apportioned according to the Constitutional rule. The average amount collected per capita in Massachusetts was $1.68 while the per capita average for the whole country was 98 cents. The per capita average for the State of Alabama was 7.2 cents and for the State of Oklahoma 2.7 cents, as shown by the

same authorities. Combined, the six New England states plus New York, New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia paid 63.59 per cent of the total tax, although they have but 30.06 per cent of the total population. These figures indicate the extent of the injury by reason of the failure to observe the rule of apportionment.

This Court considered at length the distinction between direct and indirect taxes in the case of Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, and later in the case of Knowlton *v.* Moore, 178 U. S. 41, 89, and cited many instances of taxes deemed to be excise taxes. It is believed that the invariable test is that in the case of a direct tax there is always present the element of absolute and unavoidable demand. In the case of indirect taxes that element is lacking. In other words, an indirect tax can always be avoided by foregoing the exercise of the privilege to which the tax attaches.

The principle was stated by Alexander Hamilton in the twenty-first number of the Federalist:

> "Imposts, excises, and in general all duties upon articles of consumption, may be compared to a fluid which will in time find its level with the means of paying them. The amount to be paid by each citizen will in a degree be at his own option and can be regulated by an attention to his resources."

Hamilton's view is entitled to great weight because it represents contemporaneous opinion when the Constitution was adopted.

In holding valid a stamp tax (30 Stat. 448) imposed on sales of stock by brokers, in Thomas *v.* U. S., 192 U. S. 363, as the exercise of a privilege, the Court said:

"The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking."

In Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, this Court adopted the same distinction:

"Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, . . . and the payment of which cannot be avoided, are direct taxes." (157 U. S. 429, 558.)

In Nicol *v.* Ames, 173 U. S. 509, this Court in dealing with an excise tax imposed on the privilege of selling at boards of trade, said:

"We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade, or exchanges, for the transaction of business mentioned in the act." (173 U. S. 509, 519.)

"In order to tax it, the privilege or facility must exist in fact, but it is not necessary that it should be created by the Government. . . . A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax on every sale made in any place. The latter tax is really and practically upon property." (173 U. S. 521.)

In South Carolina *v.* U. S., 39 Court of Claims, 257 (affirmed 199 U. S. 437), direct taxes and excise taxes were distinguished in the following language:

"A tax is obligatory; from it there is no escape. An excise is voluntary; a purchaser who would pay it cannot be compelled to purchase."

It is not enough to justify an excise tax that it be imposed upon a privilege of use. There must be presented also the exercise of the privilege of use. This was distinctly held in McCoach *v.* Minehill, etc., Railway, 228 U. S. 295.

Cooley, Constitutional Limitations, 7th Edition, 680, defines "excises" thus:

> "Excises are taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges."

This definition was adopted in Flint *v.* Stone Tracy Co., 220 U. S. 107.

Instances of excise taxes might be multiplied indefinitely, but it is believed that no adjudicated case can be found in this country of an excise tax where there existed "the element of absolute and unavoidable demand."

Excise taxes as well as other indirect taxes can always be avoided by foregoing the exercise of the privilege to which they attach. From the Federal Estate Tax, however, no escape is possible. The tax attaches to all property at the instant of the owner's death precisely as local property taxes attach to property owned by a living person on April first or on such other date as may be fixed by State law. Like certain local property taxes, it becomes a lien on the property itself and is collectible out of the property itself. It has all the attributes of a direct tax.

Section 201 of the Act of September 8, 1916, provides:

> "That a tax . . . is hereby imposed upon the transfer of the net estate of every decedent."

It is submitted that if the words "the transfer of" were omitted, it would not occur to any one to suppose that the tax was anything but a direct tax. The omission of these words would not in any way affect the other provisions of the act, and it is a fair inference that the sole purpose of the insertion of these words in Section 201 was to give the tax the semblance of an excise tax.

In Collins *v.* New Hampshire, 171 U. S. 30, this Court said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language the statute may be framed, its purposes must be determined by its natural and reasonable effect."

Applying this rule to the act in question, it is felt that it has all the attributes of a direct tax. Its direct and necessary result is to levy a tax upon the property owned by a decedent at the time of his death, measured by the value of such property and collectible out of such property, without reference to the shares passing to legatees or distributees, and without reference to their relationship to the decedent.

That this tax is in effect a tax on property and not a tax upon the transfer of property by death, is indicated by those provisions of the act which undertake to tax transfers which were completed during the testator's lifetime.

Section 202 contains the arbitrary provision that the gross estate of the decedent shall include the value at the time of his death of all property

"to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust in contemplation of, or intended to take effect, in possession, at or after his death, except in case of a *bona fide* sale for a fair consideration in money or money's worth,"

and further

"to the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either, or the survivor, except such part thereof as may be shown to have originally to have belonged to such other person and never to have belonged to the decedent."

These provisions are inconsistent with the claim that the Federal estate tax is a tax upon the transfer of property or the transmission of property by death. In both cases the transfer took place prior to death.

If the tax is valid, its natural and necessary effect is to impose a tax at the end of man's life not only upon property which he owned at the time of his death but also property which he had ceased to own at the time of his death.

The meaning of the word "transfer" involves the existence of a transferor, as well as a transferee, and an act in which both participate.

The decedent cannot be regarded as a transferor. His title and ownership cease at the instant of his death, and not until his death is there a change of ownership. That change of ownership results from no act of the former owner, but is wholly created by the operation of the State law.

If it be true that the tax in its real essence is a direct

tax upon property, the fact that it is labelled as a tax on the transfer of property should not prevent its being declared unconstitutional because not apportioned in accordance with the requirements of the Federal Constitution.

This Court in Galveston, Harrisburg & San Antonio R. R. *v.* Texas, 210 U. S. 217, 227, said:

> "Neither the state courts nor the legislatures by giving the tax a particular name or by the use of some form of words can take away our duty to consider its nature and effect."

And in Pollock *v.* Farmers Loan & Trust Co., 157 U. S. 429, 581, this Court said:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court."

The Supreme Court of Missouri in State *v.* Switzler, 143 Mo. 287, 327, 328, considered the constitutionality of an erroneously so-called succession tax statute. In holding the tax to be a tax on property it said:

> "The General Assembly has declared that it intended to levy a 'collateral succession tax', and we all agree that by whatever name this exaction may be called, it is referable to the taxing power of the state. The controlling question is, upon what did it authorize that the tax be levied, upon the property or estate of the deceased person, or upon the right or

privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter, it is settled by the great weight of authority that it does not fall within the ordinary taxation of property which our Constitution requires shall be in proportion to its value."

"A 'succession' tax, as the words indicate and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of this state. Wherever properly laid this is the distinguishing feature in contradistinction from a property tax. . . . When it is clear that the tax is upon the succession, it is computed not on the aggregate valuation of the whole estate of the decedent considered as a unit for taxation, but on the value of the separate interest into which it is divided by the will or by the statute laws of the State, and is a charge against each share or interest according to its value and against the person entitled thereto."

"Section 1 (*a*) requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. How such a tax differs from general taxes upon the property of the deceased under our system we are not able to state. The mere calling of such a tax a succession tax does not make it different from an ordinary tax on property when the effect and operation are identical with an ordinary property tax."

The case of Dawson *v.* Kentucky Distilleries & Warehouse Company, decided by the United States Supreme Court February 28, 1921, has a bearing on the question whether the Federal estate tax is a direct tax.

The question arose under a Kentucky statute imposing a tax of fifty cents a gallon upon every person

engaged in the business of manufacturing whiskey or "in the business of owning and storing" the same in bonded warehouses within the State, the tax being called in the Statute an "annual license tax", but being payable only when such whiskey was either withdrawn from bond or transferred in bond from Kentucky to a point outside the State.

The case was on appeal from the District Court of Kentucky which had granted an injunction against the collection of the tax. It was admitted by the Attorney-General of Kentucky that the tax was void under the Kentucky constitution if it was a tax on property. The only questions considered in the Supreme Court were (1) whether the case was one for equitable relief and (2) whether the tax was void under the Kentucky constitution. It was recognized that the latter was a question of State law, but not having been passed by the State Courts, it was necessary that it should be determined in the Federal Courts. The decision was against the State on both points.

The Court in unanimously holding the tax to be a direct tax on property said:

> "The question is whether as to such this fifty cents a gallon tax is an occupation tax or is a property tax."
>
> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; and obviously it has none of the ordinary incidents of an occupation tax."
>
> "In fact the tax is one imposed upon each lot of whiskey at the time it is removed from bond within the State. The tax might be said to be upon the act of removal from the bonded warehouse within the State. But as stated by the lower court, '*the thing really taxed is the act of the owner in taking*

his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, *i.e.*, consumption, sale or keeping for future consumption or sale. . . . The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value'. *To levy a tax by reason of ownership of property is to tax the property.* Compare Thompson, Auditor, *v.* Kreutzer, 112 Miss. 165; Thompson, Auditor *v.* McLeod, 112 Miss. 383. *It can not be made an occupation or license tax by calling it so.* See Flint *v.* Stone Tracy Co., 220 U. S. 107, 148–150; Zonne *v.* Minneapolis Syndicate, 220 U. S. 187; United States *v.* Emery, 237 U. S. 28."

The estate tax in its natural and necessary effect is the analogue of local property taxes. The provisions in Section 209 declaring the tax to be a lien upon the estate of the decedent, and the provisions in Section 208 providing for the collection of the tax from the proceeds of the sale of the property are patterned in a general way upon long established systems in effect for the collection of local taxes upon real estate.

It is submitted that a tax, the only necessary and essential condition of which is ownership of property at a particular instant of time is in substance and effect a direct tax on property, — that the Federal estate tax is such a tax, and therefore invalid because not apportioned according to Constitutional requirements.

CONCLUSION.

For the reasons which have been stated, it is respectfully submitted that the estate tax imposed by the Act of Congress of September 8, 1916 (39 Stat. 756, 777), is unconstitutional for the reasons:

1. That its necessary operation and effect burden and impair the sovereign rights of the States to regulate descent and distribution; and

2. That in substance and effect, it is a direct tax without apportionment among the States on the basis of population.

J. WESTON ALLEN,
Attorney-General.

[illegible] 1921

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

NEW YORK TRUST COMPANY AND ALBERT W. FROST, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF J. HARSEN PURDY, DECEASED,

Plaintiffs in Error,

v.

MARK EISNER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR JAMES A. WENDELL, AS STATE COMPTROLLER OF THE STATE OF NEW YORK.

JOHN B. GLEASON,

Counsel for THE STATE COMPTROLLER OF NEW YORK.

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NEW YORK CITY.

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BRIEF.

AUTHORITIES CITED.

STATUTES CITED.

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 286.

NEW YORK TRUST CO. *et al.*, as Executors, etc., Plaintiffs-in-Error,	
v.	
MARK EISNER.	

BRIEF SUBMITTED BY JOHN B. GLEASON IN BEHALF OF THE STATE COMPTROLLER OF NEW YORK.

POINT I.

The Estate Tax is void if its necessary effect is to make a deduction from the estate or from the transfer prior to the imposition of the State Transfer tax, or if the State tax must be adjusted as stated at page 48 of the brief of the Solicitor General.

At page 48 of the brief of the Solicitor General, after correctly stating the decision in *Matter of Gihon,* 169 N. Y. 443, refusing to make a deduction

from the New York transfer tax on account of the Federal legacy tax of 1898, it is said:

> "Of course a different rule would have applied if one of the taxes had been an estate tax, which must be paid before the amount for distribution and, therefore, the amount to be received by the legatees and devisees could be ascertained. In such cases, of course, the estate tax is first deducted, and the legacy tax is imposed on the amount to which the legatee is entitled after the estate tax has been deducted from the net estate. In the present case it happens that the estate tax—that is, the tax which must be paid before the share of the legatee can be ascertained,—is the tax levied by the Federal Government."

But the State of New York refuses to permit any deduction on account of the estate tax;

> *Matter of Bierstadt*, 178 App. Div. 836.
> *Matter of Sherman*, 179 App. Div. 497; affirmed without opinion, 222 N. Y. 540.

In each of these cases, in my brief for the State Comptroller, the constitutionality of the Federal estate tax was directly challenged, if construed otherwise than as a legacy tax. In the *Bierstadt* case, the court expressed the opinion that if the tax was not a legacy tax it was void as a direct tax on property. In the *Sherman* case the court decided that the New York transfer tax law did not contemplate or permit any deduction on account of the Estate Tax, and also said:

> "The conditions of transfer have been embodied by the State in the Transfer Tax Law. If the Federal Government may impose an inheritance tax which is entitled to be deducted from the estate prior to the assessment of the State Transfer Tax, *it has interfered* with such conditions, and has diminished the amount

which the State has appropriated as a condition of the transfer being had, by the percentage upon the sum appropriated by the Federal Government. The State Transfer Tax will thus have become one not upon the whole estate transmitted, but upon the whole estate less the amount of the Federal tax * * * The constitutionality of a Federal act entitled to such construction and effect might well be doubted."

In *Matter of Penfold*, 216 N. Y. 163, the residuary legatee complained because in adjusting the transfer tax upon the transfer to him, the tax was measured upon the value of the property as of the date of death, although as the result of large losses in realizing upon the securities, he actually received much less; also he complained because no deductions were allowed on account of the transfer taxes of other States. The Court of Appeals having upheld the method of taxation, he obtained a writ of error to this court, which was dismissed for want of jurisdiction (*Penfold* v. *State Comptroller*, 248 U. S. 537).

In my brief in that case, it was claimed that the power of the State was plenary, and that no Federal question was presented.

As regarded the assignment of error for refusal to deduct the inheritance taxes of other States, the brief of the plaintiffs-in-error in the *Penfold* case urged many and more reasons than those announced by the Supreme Court of California in *Estate of Miller*, Calif. (61 Calif., Dec. 90, decided Jan., 1921), where that court held that the inheritance tax of Nevada must be deducted from the California estate before computing the California transfer tax, because the authority of the State of Nevada over the stock of one of its corporations was superior to the law of the domicil, etc. That court

also decided that, assuming the validity of the Federal estate tax, it must also be deducted.

It seems that the dismissal of the writ of error in the *Penfold* case sanctions the position that it is for the *State* to say whether or not it will permit the deduction of the Federal estate tax, and that this court will not so construe this tax as requiring the State to measure its tax in the manner indicated by the brief of the Solicitor General; for then the statute will regulate the transfer tax law of New York, and the difference between such regulation and the present operation of the New York transfer tax law is a difference of some millions of dollars yearly.

The 1919 rates take 25% of all sums over $10,000,000, which would here mean a loss to the State of one-fourth of its tax at its highest graded rate.

Examples of regulation of transfer:

1. *Transfer without residuary clause.*

Gross estate..................	$13,240,000
Debts and expenses...........	1,000,000
Net estate....................	$12,240,000
Passing to A.................	$12,240,000

2. *Under will with residuary clause.*

Gross estate..................	$13,240,000
Debts and expenses...........	1,000,000
Net estate....................	$12,240,000
Passing to legatee A..........	$10,000,000
Passing to residuary legatee R.	2,240,000

Legatee A in each case receives $10,000,000, no matter by what name the tax is called. The rest equals the estate tax at 1919 rates. In the second example the entire residuary estate equals the estate tax. The tax at 1916 rates is $1,065,000.

The foregoing instance is approximated to an actual case in the New York transfer tax office where, however, the estate tax is larger and does not exactly equal the residuary estate. Any example is adequate, but the foregoing is easy to follow and it will be seen that each increase of $4,000,000 over the above example would be a loss of $1,000,000 of property taxable by the State, if the estate tax should be deducted before the computation of the State tax. If we *must* do this, it is respectfully submitted that, by whatever name the tax is called, and we should prefer to call it by some hard name, the law of property of the State of New York has been regulated by the Federal statute. To follow the reasoning of this court by Mr. Justice Peckham in *Nicol* v. *Ames,* 173 U. S. 509, 515, *et seq.*, in a passage rather too long to quote 'no abstruse or subtle distinction, or microscopic examination is called for, or any scientific or economical problem. This is a practical matter and a court'

> "would not be justified in placing it in a class different from which its practical result would consign it. Taxation is eminently practical, and is, in fact brought to every man's door, and for the purpose of deciding upon the validity a tax should be regarded in its actual practical results" (*id*).

In New York it is a law of property that a man shall have more than a life estate in his property, upon condition of the payment at death of a per-

centage called the transfer tax. If, for example, the State had adopted a *"fee-farm"* tenure of real estate, reserving to itself the title and a perpetual rent, the interest of the feoffee would be transmitted at his death, nor could Congress by an estate tax diminish the rights of the State. The matter will be further considered *infra*.

In point of fact, the State transmits by as many different transfers as there are legatees. Each act of transmission is not divisible into parts, as in the rule of *Se offendendo*, laid down in Hamlet following *Hales* v. *Petit*, 1 Plowden, 253.

There is an *instant* vesting at death in the legatees of that part of *ownership* of the net estate which made the ownership of the decedent greater than a life estate, and deemed to be of its value at the date of death.

The entire net estate is lawfully in the transmission, and Congress imposes its tax upon the value at death of the property in the transfer. If the case is the descent of real estate worth $12,240,000 to the heir, with no other property or debts, there is no inch of this real estate which does not descend to the heir, but the whole of the property is received by him at the instant of death, and the tax is properly computed upon the full value of the property transmitted. Inasmuch as there is no property to pay the tax except the property in the transfer, the transferee must pay it. Title *of the transferee* is unquestionable and the situation is as if he gave his individual bond, for the immediate payment of the tax on account of this valid transfer to him, and secured by mortgage upon the property.

New York regulation of transfers wherein death is a determining factor.

Tax Law, S. 220. "A tax shall be and is hereby imposed upon the transfer of any property * * * to persons and corporations * * * I. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed thereof while a resident of the state" etc.

Gross Estate.

In the adjustment of the tax, the actual value of the gross estate at the date of death is taken as the starting point (as is also the case with the Federal estate tax). From this value is deducted the debts and expenses of administration. It is a rule of property in New York that the portion of the gross estate which is appropriated by law to the payment of debts and administration expenses does not vest in the beneficiaries—does not pass to them.

Matter of Gihon, 169 N. Y. 443.

Expenses of Administration.

These are incidental disbursements made, subject to the approval of the surrogate, for counsel fees, advertising for creditors and the like, but the executor in making up his accounts is not always careful to discriminate between the fund for the obligations of the decedent incurred in his lifetime, and his official disbursements, and disbursements in fact for the account of certain of the legatees.

Net Estate.

The remainder (as in the Federal statute) is the net estate, which is deemed to be transferred to the

beneficiaries proportionately, so that in the second example above given there is

A fund not passing to the legatees.....	$1,000,000
A transfer to legatee A...............	10,000,000
A transfer to residuary legatee R......	2,240,000
Gross estate	$13,240,000

In this regulation, the interest of the residuary legatee is as definite and certain as is the interest of any other legatee, although it will inevitably happen that the amount actually received by him on the final distribution will differ from these figures (*Matter of Penfold, supra*).

The terms *legatee, legacy, legacy tax* are conveniently used with reference to the above situation, whether arising by will or by intestacy.

Vesting.

The rights of the *legatees* vest at the death of the decedent.

In *Matter of Ramsdill,* 190 N. Y. 492, 495-496, the highest court of New York quoted with approval the following from

> *Hooper* v. *Bradford,* 178 Mass. 95, 97 (opinion by Mr. Chief Justice Holmes followed in)
>
> *Kingsbury* v. *Chapin,* 186 Mass. 533:

> "The rights of all parties, including the right of the Commonwealth to the tax, vest at the death of the testator. It is true that the interest of the legatee is subject to an accounting, but it is an interest in an existing fund and is analogous to that of a *cestui que trust*".

In the New York statute (as well as in the Federal statute) the *legatees* are conclusively deemed to receive the portions of the net estate thus vested in them at death.

Classification of Transfers.

(1) *Transfers where the executor receives nothing.*

This large and important class includes

(1*a*) Real estate passing by intestacy or by will without an active trust.

(1*b*) Estates by Entirety, and joint estates

(1*c*) Transfers *inter vivos,* in contemplation of death, or intended to take effect in possession or enjoyment at death.

Intresting examples under this heading are supplied by

Matter of Orvis, 173 App. Div. 1; affirmed 223 N. Y 1.

Matter of Garcia, 183 App. Div. 712.

(2) *Transfers by intestacy.* The statute of descent of real estate differs from the statute of distribution of personalty to the next of kin, as regards representation, and it may happen that one person who takes but part of the real estate will take all the personalty.

(3) *Transfers by will.* (3*a*) Where the estate is divided proportionately; (3*b*) Where there is a residuary clause. Large estates ordinarily pass under a will containing a residuary clause. *A direction in a will to pay inheritance taxes from the residue* increases the legacies by the amount of the tax (*Matter of Gihon, supra*).

The Executor.

The executor, including in this term *an administrator,* is an *officer* appointed by the Surrogate and is required to take an oath of office (Code of Civil

Procedure, § 2568 *"Official oaths of executors, &c."*).

The State confers upon him certain rights of administration regarding the property vested in the *legatee*, enabling him to take the personal property into his possession, as well as real estate held upon an active trust, giving him remedial rights in aid of this possession, and with the right and duty to convert into money the portions required to pay the debts and his expenses, or receivable by the *legatee* in money.

He represents the power of the State and not of the testator. He is a receiver appointed by the court and subject to its direction He is the custodian of two funds, one of which is the fund in which the creditors have a vested right—plus his incidental disbursements,—and the other fund is the net estate as above defined and in which the legatees have vested rights. For the purpose of the adjustment of the transfer tax (as well as of the Federal tax) he is *deemed* to have the net estate as above ascertained. *Case of tax lawfully assessed against the legatee, where the executor receives no money.* Such a case was presented by *Matter of Meyer*, 209 N. Y. 386, where a transfer tax was assessed against the legatee according to the value at death of mortgaged property, upon which the mortgage was subsequently foreclosed and the equity was destroyed—*held;* that the executor was not personally liable to pay the tax, despite the command of the statute.

Inasmuch as the executor is the custodian of two funds; one fund for the payment of debts and one fund comprising the net estate transmitted to the legatees, the Federal law must tell him from which fund he shall pay the Federal tax. If he pays from

the first fund, he pays a debt of the decedent; if he pays from the second fund, he pays for the account of the legatees proportionately. Upon the assumption that the Federal estate tax was of the same character as the State tax, as a tax on the transfer, Mr. Surrogate Fowler, in *Matter of Bierstadt*, 166 Supp. 168, stated the case of the tax upon the transfer of a bequest of $10,000 to a nephew where the State tax is taken as $500 and the estate tax as $100, as follows:

> "The net amount which the legatee would receive from the executor would be $9,400. *But that would not be the value of the property transferred to the legatee under the will* of the decedent. The actual value of that transfer was $10,000. The $500 tax paid to the State of New York was not transferred to it by the will of the decedent, neither was the $100 paid to the United States transferred to it by the will of the decedent." (Italics ours.)

Here it may be noticed that if the executor pays the Federal estate tax without objection and the parties to the final accounting admit the legality of the payment, so that it is allowed to the executor as a disbursement, the adjudication of the surrogate allowing the payment as a disbursement cannot be reviewed on appeal, but only the question whether, assuming the validity of the tax, is it payable from the estate, as a debt, or is it paid for the account of the legatees. In the absence of a construction of the estate tax by this court, this question has been answered differently in different jurisdictions. In *Matter of Hamlin*, 226 N. Y. 407, the Court of Appeals of New York, assuming the validity of the Federal tax, was of the opinion that the tax was to be charged against the residuary estate. Such also was the opinion of the Appellate Division in *Matter*

of Sherman, supra, but further deciding that the New York transfer tax law did not contemplate or permit the allowance of such a tax as in diminution of the State transfer tax, a decision affirmed by the Court of Appeals.

American Statutes.

All these statutes impose taxes upon the transfer of any property by will or intestate law, to any person (or 'except those hereinafter exempted'); or use the words 'all property which shall pass by will &c. to any person &c.' (or except those hereinafter exempted), or in case of Vermont and Virginia use special language imposing *legacy* taxes, and are *legacy* taxes similar to the New York statutes; except

Utah (Comp. Laws 1907, §§ 1220-*x et seq.*) imposes *legacy* taxes graded by the size of the net estate.

Rhode Island.

Laws 1916, Chap. 1339.

S. 1. "A tax shall be and is hereby imposed upon the net estate of every resident decedent &c. * * * as a tax upon the right of transfer.

S. 5. "A tax shall be and hereby is imposed upon the transfer * * * to any person * * * as a tax upon the right to receive."

English Estate Duty.

Stats. 57 and 58 Victoria, ch. 30, p. 53.

Estate Duty.

In the case of every person dying

"* * * there shall * * * be levied and paid upon the principal value ascertained as herein-

after provided of all property, real and personal, settled or not settled, which passes at the death of such person a duty called 'Estate Duty' at the graduated rates hereinafter mentioned."

POINT II.

The tax is upon the transfer of the net estate to the beneficiaries and is paid by them or for their account proportionately; for no one else has any money to pay it.

The name by which the tax is described in the statute is immaterial:

> *Dawson* v. *Kentucky D. & W. Co.*, U. S. , decided Feb. 28, 1921, *infra*.

The definition of the tax is as follows:

Estate Tax, § 201. "That a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the value of the net estate to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent. * * *"

Net Estate.

The brief of the Solicitor General correctly states (p. 28):

> "* * * net estate—that is that portion of the estate which, as a result of the death was transferred to the beneficiaries."

The term is not a term or work of art, but coincides with the net estate as regulated by the laws of New York, but with an exemption of $50,000, which is an act of grace and does not affect the legal questions.

Substituting the language of the Solicitor General, the section is

> *That a tax is hereby imposed upon the transfer of that portion of the estate which, as a result of the death, was transferred to the beneficiaries.*

This is the operative—the dynamic—section of the Act.

Applying the section to example (1), *supra,* the Act says:

> *That a tax is hereby imposed upon the transfer of the net estate of $12,240,000 to the legatee A.*

The transfer which has been regulated by the State is recognized as a valid transfer.

The term *transfer,* like the term *property* is of too definite a nature to be affected by what people in Congress thought about it. The decision in *Gleason* v. *Thaw,* 236 U. S. 558, appears to be in point; where the court justly omitted to consider the claim of the brief of the plaintiff-in-error that the debate upon the Bankruptcy bill evinced an intent to extend the amendment to all cases of actual fraud by the use of the term *property* to include the Constitutional meaning that Labor is property.

In every transfer, there is a transferor and a transferee and a definite amount of property transferred, and the power of the State regulating and validating the transfer. The *amount of the prop-*

erty transferred by the transferor is the amount of the property received by the transferee, valued as at the instant of death. The Federal Government finds these transfers ready made and undoubtedly may tax them. In so doing it does not change the character of the transfer, which does remain, and must remain a valid transfer to the transferee of the property transferred. The instances of transfers between the living referred to in the brief of the Solicitor General are in point. If A transfers 100 shares of stock to B, Congress may tax this transfer as a valid transfer, but cannot change it in any way, as, for example, by taking ten shares out of the transfer. If A joins in one deed a transfer of Blackacre to B and of Whiteacre to C, Congress may tax these transfers, as valid transfers, but cannot change the transfer of all or any of the property named in the deed. In each of these examples, Congress in imposing a tax upon the transfer may lawfully direct that the transferor shall pay it, as by stamps affixed. But suppose that he does not pay it, the transfer of the property to the transferee remains valid, because as a transfer it is wholly regulated by the law of the State. If Congress should enact that the above named deed should not be recorded until the stamps were affixed, such a law would be void (*Cooley Const. Lim.,* 6th ed., 592). If the facts were that two pieces of real estate named in the deed comprised all the property of the vendor, it would be necessary to follow the lien upon the property transferred, and the vendees paying the tax would pay it proportionately. It is conceivable that one might reach into a sealed envelope in lawful transmission to me containing money and a deed, and get my money, or reach into a cargo of livestock, but it is impossible for the Government to alter the transfer specified in sec-

tion 201; it must accept the transfer as regulated by the law of the State.

By the device of wresting or rescuing statements from their context in the cogent and admirable brief of the Solicitor General and interpreting them a bit, an agreement with some of the foregoing views might appear to be indicated.

p. 30 "This is a tax simply upon the transfer of property as a result of death.

p. 11 "The power so brought in being is the power to impose a tax on the transmission of property from the dead to the living.

p. 21 "the power of the State to regulate the transmission of property does not exclude the power of Congress to tax that transmission when regulated."

p. 25 "*one person must transmit and another receive, before it can be said there is a transmission.*" (Italics ours.)

p. 26 "there is no difference between the nature of a right to transmit property by will, or as the result of death and the nature of the corresponding right to receive such property. The two rights together make possible the transmission from the dead to the living."

p. 27 "The actual transfer which results from death is in fact the transfer by which the beneficiaries finally receive the property."

Therefore it may seem unnecessary to enquire whether Congress might have taxed something else than this transfer as thus regulated. The language of the section is clear. It follows that any subsequent declaration of Congress to collect this tax upon the transfer out of anything else than the property in the transfer will be nugatory; for there is no such other property. If the direction is to forcibly withdraw it from the transfer and reduce

the transfer by the amount thus withdrawn, then the transfer is regulated by the Federal Government.

Sec. 207. "That the executor shall pay the tax to the collector"

Such a direction is common to all inheritance tax statutes and is within the power of the Federal Government to the extent that the executor has any portion of the property transmitted to the legatees. But the transfers may be all or mainly in class (1), *supra,* and the tax may be paid out of them, by some one not the executor. Thus, if the decedent has given $1,000,000 to his wife, as in *Matter of Garcia, supra,* reserving rights to himself during his life, the transfer is taxable as part of the net estate transferred and at the same rate, and assuming that the tax is $1,000,000 it may all be collected from the widow, *or only the portion upon* which she is subject to a tax, if any,—according to the proper construction of Section 209, which logically should precede section 208.

Section 209:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent" * * *
>
> "* * * If the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a *bona fide* sale for money or money's worth) *and if the tax in respect thereto is not paid when due,* the transferee or trustee shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax." (Italics ours.)

Cf. s. 409. As to *Insurance Moneys.*

In New York we have all sorts of such transfers *inter vivos*. The simplest case is where the grantor conveys say $1,000,000 absolutely, subject to the payment of the income thereof to himself during his life. He may live many years thereafter, but a tax is payable by the beneficiary at the date of the conveyance, computed upon the value of the estate to take effect in enjoyment at death, although no one ever pays it, and so that at death it is taxed as the transfer at death of $1,000,000. Or, as in *Matter of Garcia, supra*, the conveyance may be testamentary—the difference being that the grantor could not revoke the first conveyance, but could revoke the second. Section 209 speaks as if it had the first kind of conveyance before it. Inasmuch as the $1,000,000 of my example forms part of the gross estate, the section starts with saying that it may all be taken for the tax, by enforcing the lien against it. It also speaks of the tax *in respect to this particular conveyance*, as if constituting a separate transfer, taxable at the graduated rate of the net estate, say, 10% or $100,000.

Section 208:

> "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

This section has 65 words between two commas in a sentence of 146 words, and irresistibly reminds one of the answer of Dean Alford—when a book called "The Dean's English" complained that one sentence was capable of 216 meanings—"that he did not write for fools": for this section is written for wise men.

These two sections are capable of the construction that the words of section 209

> "if the tax in respect thereto is not paid when due * * * such property * * * shall be subject to a like lien to the amount of such tax"

indicate a tax with respect to this particular transfer; that if the total estate tax is, say, $1,000,000, the whole of the particular transfer may be impounded under the general lien or sold by the collector under the provisions of the first part of section 208; that then if the tax or any part of it *beyond the tax in respect thereto named in section 209* is paid out of the particular transfer, there shall be reimbursement or a just and equitable contribution, the intent being that so far as is practicable *and unless otherwise directed by the will of the decedent* the tax shall be paid out of the estate passing to the beneficiaries before its distribution.

Turning now to section 408 of the Act of 1919, it states at the end of it:

> "If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000 of such policies bear to the net estate."

Looking at section 409, it is seen that this insurance money is in the same category as the transfers in contemplation of death, &c. It seems that this particular transfer must pay the tax, less its exemption. That other constructions are practicable, is in no way disputed, but they must do some violence to some language and must fail to give any effect to the words *the tax in respect thereto* of section 209.

The objection to taking away from beneficiaries, by the guise of a tax, sums varying by reference to the total of the net estate, is not escaped by an estate tax, meaning by *an estate tax* a tax whose incidence is that of a debt of the decedent. In all cases there is no difference, as regards the effect of the Federal tax on the beneficiaries, whether it is a legacy tax or an estate tax, *except* the case of a will with a residuary clause, and except for further inequalities which might be dug out in the case of transfers where the executor receives no money. In cases of intestacy it ordinarily happens that some of the next of kin take by representation and unequally. So soon as they take unequally, there is the inequality of the rate graded by the size of the estate, as compared with others in smaller estates and in the same degrees of relationship. Therefore any example whatever will show inequality, and the following example may be offered. An intestate; net estate \$1,000,000; next of kin—three brothers, four nephews, sons of a deceased brother, five grandnephews, sons of a deceased nephew who was son of the deceased brother. Another intestate; net estate \$50,000; next of kin five grandnephews. Each of the above grandnephews receive \$10,000. In the first estate each contributes or loses \$515 at 1919 rates, and in the second estate each contributes or loses \$100.

Going back to the figures of the very first example, if a resident of Pennsylvania died intestate after having made a gift to his wife of $10,000,000 to take effect in enjoyment at his death and left a son, and real estate in New York worth $2,240,000, and the widow pays the tax, then she is entitled to reimbursement from the son, which will sweep away his whole estate, by the force of the Act. These extreme instances point to an inherent inequality, varying only in degree. The same thing will happen in every will where the testator divides his estate proportionately, or gives bequests exceeding his net estate. And how is this inequality remedied? By exempting all the legatees but one from any tax, where there is a will with a residuary legatee, and making him pay the tax for all of them.

It has been shown, *supra*, that in the regulation of transfers by the State of New York, there is a fund for the payment of debts, which does not pass to the legatees, and the rest, less administration expenses, is vested at the instant of death in the legatees and the share of the residuary legatee is certain, because capable of being rendered certain by the deduction of the legacies from the net estate. This is the transfer which section 201 purports to tax. If there were a valid tax imposed upon the property in the lifetime of the decedent, as, for example, installments of the income tax falling due after death, these would be deducted from the gross estate in the same way as any other direct obligation of the decedent, and the tax of section 209 would fall upon the net estate as thus constituted. But the "estate tax" is upon a transfer which carries all the money to the legatees. Now what has happened to the residuary legatee of example II, *supra?* He has paid a tax of $89,600 to the

State of New York as the condition of the transfer to him of this $2,240,000, but the Federal Government says that he cannot have any of it, in the construction of the Solicitor General. There is no presumption that rich men know very much; even Mr. Frick, who was a very wise man, appears to have been greatly in error as to the size of his residuary estate. In making his will the ordinary citizen may have thought that he had a right to rely upon the fact of these transfers as regulated by the law of the State and that the Federal Government would not seek to change this situation, and that if it attempted to place all its tax on any one of his beneficiaries that the attempt would be vain; or he may not have given any thought to the subject, believing his estate to be much greater than the future would disclose.

Query, if the tax is not valid if construed to be a legacy tax.

The question remains whether the Act, if taken to be what section 201 declares it to be, a tax upon the transfer to the beneficiaries, is void if apportioned between the beneficiaries according to the size of the net estate. Even if this large tax be deemed unjust, injustice justly distributed wrongs no one. The legislator says that the tax is justly distributed because in all estates of the same size it is the same. It will be noted that in *Knowlton v. Moore*, Mr. Justice Harlan and Mr. Justice McKenna were of the opinion that that legacy tax was graduated by the size of the estate and valid, nor did the majority opinion say that the Act thus construed would be void.

The alleged injustice of *any* graded rate must be excluded. As regards transfers in a non-resident

estate, a State may attain to the inequalities of the estate tax, *as to transfers within its jurisdiction,* by a development of the tax upheld in *Maxwell* v. *Bugbee,* 250 U. S. 525, measuring its tax upon the property within the jurisdiction by reference to the total size of the estate wherever situated, and the total amount passing to the beneficiary, thus producing double taxation at the highest graded rate of each State, but not criticised on that account in the dissenting opinion, which proceeded on the ground that the practical result was the taxation of property without the State. Now if, in the large estate, the size of the legacy is in relation to the size of the estate, that relation is a ground of taxation. But the legislator says that there is such a relation; and that the small legatee in the large estate should be thankful that the estate was large, instead of finding fault about his tax; for if the estate had been smaller he would not have received anything.

POINT III.

If the tax is "an estate tax" it is void as a regulation of the transfer, and as a tax on property without apportionment.

In the inadequate time allotted me for the preparation of this brief, I will try to obviate the need of a review of authorities by beginning with the approved definitions of *Austin:*

> *Austin's Lectures on Jurisprudence* (Campbell ed.).

Power: Lecture XVI, pars. 572-3:

"What is meant by saying a right is a power? The party invested with a right is invested with that right by virtue of the corresponding duty imposed upon another or others. And this duty is enforced, not by the power of the party invested with the right, but by the power of the State 573. It may indeed be said that a man has a power over a thing or a person when he can deal with it according to his pleasure free from obstacles opposed by others. Now, in consequence of the duties imposed upon others he is thus able. And, in that sense, a right may be styled a power. But even in this sense, the definition will apply only to certain rights to forbearances. In the case of a right to an act, the party entitled has not always (or often) a power."

Property, L. 58, Par. 1056:

"Property or dominion * * * is applicable to any right which gives to the entitled party an indefinite power or liberty of using or dealing with the subject" (*indefinite,* as explained not susceptible of positive and exact circumscription, cf. 1067-8, 1085).

Rights of Property, L. 51-2:

Par. 1094: "When we speak of a right we can only, using language accurately refer to the present moment. A future right is a contradiction in terms. * * * But the purpose of the concession by the State may regard the future, and so far as that purpose regards the future, the State may confer a present right. 1095. By the term *concession*—* * * I mean the entire sum and scope of the acts, intentions, purposes and desires of the State as declared or indicated at the given epoch in relation to the use and enjoyment, present and future, of the thing, the subject of the concession, and the interests of the various members of the community therein. 1096. Now the concession

may be calculated to confer enjoyment upon one or more persons either for a limited period or for an unlimited period, * * * as 'to A and his heirs forever'."

Absolute property or dominium:

1103. "It is a right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition from himself and his successors *per universitatem* and from all other persons who have a *spes succesionis* under any existing concession or disposition, in favor of such person or series of persons as he may choose, with the like capacities and powers as he had himself, and under such conditions as the municipal or particular law allows to be annexed to the dispositions of private persons."

To these general statements may be added that *privilege* as referred to property, is a right of property, more properly applying to exemptions from such burdens as others are subjected to, and also, in a well defined sense taken from the Civil Law, to a *jus in re* arising from the nature of a debt which has been contracted with reference to a specified thing. *The right of creditors to have the property of a decedent applied to the payment of their debts is a privilege.* The important right of obtaining credit is correlative to this privilege of creditors.

It follows that the brief of the Solicitor General errs in stating at page 41 that Congress might have measured its tax upon the gross estate of the decedent; which would permit the imposition of this tax in an insolvent estate; a thing that the State of New York cannot do (*Matter of Watson*, 226 N. Y. 384, 402) or has so regulated its law of property that this privilege of creditors is paramount.

The State may change its laws of property in certain ways, and in particular with regard to the rights to have the property transferred at death to the *legatees*. A tax upon the right to have the property transferred at death, is a limitation of the right of property, a regulation of the right. The property thus taken is withdrawn from the property, by virtue of the power of the State to regulate rights of property and the transfer thereof—a right which the Federal Government does not possess. The tax upon the transfer of what by law may be transferred has been repeatedly upheld in this court as a regulation of the transfer, as in

Mager v. *Grima,* 8 How. 490, 493:

> "Now the law in question *is nothing more than an exercise of the power* which every state and sovereignty possesses, *of regulating* the manner and terms upon which property real and personal within its dominion may be transmitted by last will and testament, or by inheritance." (Italics ours.)

This language has been often quoted in the opinions of this court, and always with approval, as in *Maxwell* v. *Bugbee,* 250 U. S. 525, and is also quoted with approval in *Matter of Watson,* 226 N. Y. 384. And in *Snyder* v. *Bettman,* 180 U. S. 249, 250, it was said:

> "that the inheritance tax of the State was in reality a limitation upon the power of the testator to bequeath his property to whom he pleases."

Obviously a Federal tax cannot be upheld upon any such ground. Not being apportioned, it cannot be upheld as a tax either upon the right to transmit, or as a tax upon the right to receive; for these are correlative rights of property. But if the State

were impeded, in the same way as the Federal Government, by the existence of a right which required the State to permit the transfer of the entire property of A to a certain party B, then the State itself could not regulate the transfer, although it might impose a tax upon the transfer, and necessarily payable by B, in the event that A is gone forever and all his property is in the transfer.

Taking any transfer as regulated, as for example the transfer of Blackacre, worth $12,240,000 from a decedent having no other property and no debts to the heir H, upon condition of the payment of the State Transfer tax,—a necessity imposed by the Estate Tax to take away $2,240,000 and to impose the State tax only upon $10,000,000 is a regulation of the property law of the State of New York and also regulates the transfer. The Government, under the guise of an indirect tax at death upon the transfer of the property, which it recognizes and must recognize as a valid transfer, cannot make the incidence of the tax such as to change the transfer. It seems clear that a construction must be given to the Act that it does not interfere with the power of the State to impose its transfer tax as before. Even so, the Courts of New York will be confronted with case where the residuary legatee, upon whom a State tax has been imposed, has had all or the bulk of the residue swept away by the Federal tax. The right of the State to impose its tax under these circumstances is challenged, by reason of the alleged manifest injustice now appearing, as well as by want of power to tax that which has been taken by the power of the Federal Government. Therefore the State Comptroller is still constrained to object that an estate tax is void, both as a regulation of the transfer and as a tax upon property.

A man does not have two kinds of ownership—ownership and a right to transmit that ownership; the right to transmit that ownership is included in the ownership. Ownership of real estate in fee includes the right of enjoyment of the use of the property; right to borrow the full value of the perpetual use upon a mortgage payable at a specified time after his death; the right to credit upon the strength of this ownership; the right to have the property transmitted after his death in accordance with the law of the State; and certain incidental and remedial rights going to make up the right of property; and further the right to sell the things which are the subjects of these rights to others who will then have like rights—thus giving to these things, also called property, *value* in exchange. The market value of all these rights of ownership at any time constitutes the worth of his property at that time. *Without the right of transfer at death, ownership would be cut down to a life estate.* Therefore the right to be transmitted and the right to be received qualify the objective property. Where the brief of the learned Solicitor General suggests that this is a tax against the decedent, or upon a right owned by him, a direct tax upon property is indicated. Thus, page 41 of that brief:

> "It says to the owner of property *you have the right* upon your death *to have your property transmitted* and distributed as you may direct by will or as may be provided by State law, *and as against that right there shall be assessed a tax.*" (Italics ours.)

If Government can tax this right, it does not need to wait till a man's death to tax it. It may tax it, as does the State in his lifetime, as part of

his ownership. A tax upon an inseparable incident of ownership is a tax upon property.

This precise point seems to be covered by the decision of this court in *Dawson* v. *Kentucky D. & W. Company*, decided February 28, 1921, involving the validity of the statute of Kentucky imposing a tax of fifty cents a gallon as "an annual license tax" upon every person engaged in the business of owning and storing whisky and payable only when such whisky was withdrawn from bond, or transferred in bond from Kentucky to a point without the State. The court said:

> "The name by which the tax is described in the statute is, of course, immaterial. * * * 'The whole value of the whisky depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value'. To levy a tax by reason of ownership of property is to tax the property."

If this objective property consists of a bag of gold coins, there inheres in these coins value in exchange, the power of commanding this or that fine thing and in selecting and feasting through the power of one of these coins in exchange, and the best or worst that one could do would be to keep on increasing the number of these coins owned by him, but at his death the coins are exactly the same as before. If such a decedent also had a life estate in realty and an annuity, his rights in these ceased at his death, but the coins have been transmitted to the legatees. The only thing for the Federal Government to tax is the transfer to the legatees; for all the continuing rights which made the ownership of the coins different from the ownership of the life estate or annuity, have been

transferred to the legatee by the power of the State. It will be noticed that in this analysis, the right to transmit and the right to receive are parts of the rights of property and are not taxed, but the transfer is taxed, and as stated in *Scholey* v. *Rew*, the legatee may be directed to pay the tax, because of the benefit to him; following the well known rights of the Federal Government in the collection of a tax which is a lien upon property transmitted to some one. If the legatee should renounce, the Government would proceed against some one else.

In *Knowlton* v. *Moore*, the transmission tax before the court did not regulate the transmission in any way, and it appears to have been taken for granted that a tax which did regulate the transmission would be void. And it was expressly recognized at page 83:

> "For the purposes of deciding upon its validity a tax should be regarded in its actual practical results."

The practical result of an appropriation of property by a tax upon a right of property has been shown. Now the enjoyment of those rights which go to make up rights of property include activities and events of all sorts, as in the taking of my whisky from the bonded warehouse, planting my garden in the event of receiving seeds from my congressman, as well as many things of a serious and important nature, and a tax with respect to any of these things would be direct, while the tax upon the exercise of any particular activity pursued for gain would be indirect. It is now well settled that such a tax is a tax upon the exercise of the right and not upon the right itself.

Thus in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, the court said:

p. 151 "As was said in the *Thomas* case, 192 U. S. 363, *supra*, the requirement to pay such taxes involves the exercise of privileges and the absence of absolute and unavoidable demand is lacking. If business is not done in the manner prescribed in the statute, no tax is payable."

p. 155 "The tax in this case, as we have construed the statute, is imposed upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under the authority of State franchises."

As regards the suggestion that there was an unavoidable demand for the tax, as regarding business transacted in the portion of the year preceding the passage of the Act, that point was not raised in the brief of the appellants in *Flint* vs. *Stone-Tracy Company*, nor in the brief of the appellants in *Billings* v. *United States*, 232 U. S. 261, nor in any of the briefs in those cases, so far as my examination of the records has disclosed.

The French inheritance tax is a tax on *mutation* and is a legacy tax.

If we fall back upon the French definition, death is the event or determining factor of the transfer of the rights of property, but not the determining factor of the rights themselves which continue to inhere in the objective property transmitted, leaving that property of the same amount and value as before.

The concession of the State, being the concession of enjoyment for an unlimited period—as to A and his heirs forever—the life enjoyment by A, or its cessation, is not a function of the concession, which is always unlimited, except by such conditions as the State may impose. This would be very

clear if all such concessions were of entailed estates; then all would say that the event that happened at death was the transmission of the property, and no one would think of going back to the estate of A for a tax when all had been transferred to H by the terms of the concession. Accurate analysis shows no difference in the present situation, as regards the question here presented. The concession of the State permitted A to sell or to give away Blackacre in his lifetime, but inasmuch as he did not do so, what remains is the fact that the State instead of keeping the property as its own has permitted him to name the persons to whom it will transmit the property, instead of the State naming them, or the State says that if he dies intestate the State will name such and such persons to whom the property shall be transmitted. The whole difficulty here arises from the failure to distinguish what the State may do and what Congress without apportionment may do. The State may say that, as a condition of continuing its concession, a percentage of the property shall be paid at death, for the continuance of the concession and not transmitted to the legatee. This Congress cannot do. Or the State may say that all the property shall be transmitted at death to the person whom it permits the decedent to name as the recipient, upon the condition of the payment of a percentage by the recipient. Congress cannot interfere with this regulation of the transfer, although finding a transfer thus regulated it may tax the transfer to the legatee. In *Knowlton* v. *Moore* the court affirmed the right of Congress to tax the transmission to the legatee as regulated. The attention of the court was not directed to the fact that a tax in the form now contended for by

the Solicitor General would change the transmission to the legatee, nor was any such tax before the court for its decision.

The brief of the plaintiffs in error starts from the position of the District Court at page 11, that the tax is on the privilege of transfer by death—on the right of the decedent to have the estate pass by will or intestacy—and argues that this makes the words *upon the transfer* nugatory. The argument of the brief for the State Comptroller of New York starts from the assumption that this is a transfer tax and seeks to show that to be valid, it must be imposed as a tax on the transfer, and not by taking property out of the transfer, which, to that extent, would make the transfer nugatory.

It is obvious that the question of what Parliament might do has no relation to the peculiar rights of Congress. *Scholey* v. *Rew*, 23 Wallace, 331, is not an affirmance of the validity of the stamp tax provisions of the Act of 1864, which were not before the Court. Scholey sued to recover the amount of the succession tax at 6% upon the succession to real estate of the value of $45,000; total tax paid $2,700. It seems clear from the record that he never paid any stamp tax, which would have been $5. This case has been criticised in that

> "The distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to and does not appear to have been in the mind of the court. The opinion stated that the Act of Parliament, from which the particular provision under consideration was borrowed had received substantially the same construction, and that cases under that Act held that a succession duty is not a tax upon

income or property, *but upon the actual benefit derived by the individual.*" (Italics ours.)

Pollock v. *Farmers Loan and Trust Company,* 57 U. S. 429, 557;

Quoted in

Knowlton v. *Moore,* 178 U. S. 41, 80.

The speedy recognition of such inadvertence justifies the statement (*Iliad.* 4, 405).

ἡμεῖς τοι πατέρων μέγ ἀμείνονες εὐχόμεθ' εἶναι.

Respectfully submitted,

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State of New York,
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No. 286.

In the

Supreme Court of the United States

OCTOBER TERM, 1920.

NEW YORK TRUST COMPANY and ALBERT W. PROSS, as Executors of the Last Will and Testament of J. Harsen Purdy, Deceased,

Plaintiffs in Error,

vs.

MARK EISNER,

Defendant in Error.

Brief on Behalf of Clara B. Congdon, et al., Executors, Submitted By Their Counsel as Amici Curiae.

Edgewater Press, Printers, 14 N. First Ave. E., Duluth.

ARCADIUS L. AGATIN and
FRANCIS H. De GROAT,
as *Amici Curiae*,
Duluth, Minnesota.

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CITATIONS

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BRIEF OF COUNSEL, AMICI CURIAE

Through the courtesy of counsel in the above entitled cause, and by the indulgence of this court, permission has been given Clara B. Congdon, Walter B. Congdon, Edward C. Congdon, and Marjorie C. Dudley, as executors of the last will and testament of Chester A. Congdon, deceased, to file this brief herein as *amici curiae*, for the reason that the decision in this cause will have direct effect and bearing upon that certain cause now pending in the District Court of the United States, for the District of Minnesota, Third Division, wherein they, as executors as aforesaid, are plaintiffs, and Edward J. Lynch, as Collector of Internal Revenue for the District of Minnesota, is defendant; and the executors, availing themselves of the

privilege accorded, through their counsel, respectfully submit the following brief;

INTRODUCTION

The action below, brought by these plaintiffs in error as executors of J. Harsen Purdy, deceased, against Mark Eisner, the Collector of Internal Revenue of the United States for the Third District of New York, for the recovery of the sum of $23,910.77, assessed by the Commissioner of Internal Revenue of the United States, and imposed by Title II of the Revenue Act of 1916, as an estate tax upon the estate of said decedent, raises, in substance, the following questions, among others (Record, pp. 11, 12) viz.: the invalidity on constitutional grounds, of Title II of the Revenue Act of 1916, in that: the enactment diminishes and impairs the exercise by the several states of their exclusive constitutional right to control and regulate transmission or succession to property on death, and imposes such grossly unequal burdens and effects such arbitrary and unreasonable discriminations, upon or in respect to property and persons, as to deprive persons of their property without due process of law.

STATEMENT

By the Act of Congress of September 8, 1916, generally known as "Estate Tax Act" a tax equal to certain percentages of the value of the net estate is imposed upon the transfer of the net estate of every decedent dying after

the passage of the Act. The attack upon this Act with which this brief is concerned is made upon the following grounds:

> FIRST: That by its operation and effect, the Act in question casts a burden upon the power of the States to regulate transmission of property occasioned by death.
>
> SECOND: That the tax imposed is so arbitrary, unequal and unjust, and so wanting in any proper basis for classification as to amount to confiscation of property, in violation of the Fifth Amendment.

Before reaching the conclusions it was deemed essential to discuss and consider several propositions involved, and which may be stated as follows:

1. Whether by the Act in question a burden is cast upon the states' power of regulation involves primarily a proper understanding of the nature and character of the powers of the states to regulate transfers occasioned by death and of the rights resulting therefrom on the one hand, and the nature and extent of the powers of Congress to impose so-called death duties upon the other; and for that reason the respective powers of the states and of Congress must be first considered.

2. After defining and ascertaining the said respective powers, it will then be proper to more closely examine the nature of the state's power to regulate in the light of the decisions of this court, so as to more accurately ascertain and define the boundaries of the power of Congress to super-impose a tax upon a subject concerning which the states have exclusive power.

3. **These propositions being disposed of, we shall be in a position to discover whether the measure adopted over the subject so operates upon it as to cast a burden on the states' power to regulate such subject, and therefore, to make it a prohibited exaction; and independently of that question, whether the scheme of this tax is not so entirely wanting in a proper basis for classification as to result in grossly unequal burdens upon persons in like situation, and therefore to cause a spoliation of property.**

While the conclusions arrived at depend upon the application of principles, some of which seem almost self-evident, yet in view of the magnitude of the question involved, and more especially because of the apparent general misconception of the principles on which *Knowlton v. Moore*, 178 U. S. 41 (44 L. Ed. 969), was decided, the authority of which case is mainly relied upon to justify the imposition of a tax of the nature of the one in question, it has seemed necessary to consider the nature of the powers exerted in the imposition of "death duties."

The foregoing propositions will be discussed under the following headings:

FIRST: Legislation referable to entirely different legislative powers may affect the same subject, but where either state or nation possesses an exclusive power respecting a subject, the measures of the other may not affect that subject until such exclusive power of the one shall have been expended.

SECOND: The transmission of property on death is acknowledged to be within the exclusive power of the states to regulate, and all manifestations of that power are de-

signed for the entire result and the production of a uniform whole, by the authority solely possessing the power.

THIRD: The true test of the validity of the Estate Tax depends upon its operation and effect as enforced, and not upon the manner in which the taxing scheme has been characterized. So viewed, the Act clearly casts a burden upon or usurps the power of the states to regulate transmission of property on death.

FOURTH: Though there may be a seeming exercise of the taxing power, the Act complained of is so arbitrary as to constrain to the conclusion that it is not the exertion of taxation, but a confiscation of property, or so wanting in basis for classification as to produce such a gross and patent inequality as to lead inevitably to the same conclusion.

ARGUMENT

FIRST

Legislation referable to entirely different legislative powers may affect the same subject, but where either state or nation possesses an exclusive power respecting a subject, the measures of the other may not affect that subject until such exclusive power of the one shall have been expended.

As the exercise of a particular power, whether by the national or state governments, is necessarily to be measured by the scope of the right giving warrant to the

power, so in the determination of the nature and character of the Estate Tax, it becomes imperative to ascertain whether the power of Congress seeking exercise through the Estate Tax Act is within the true limits of the power of the national government.

It is common knowledge that the same measure, may according to circumstances, be arranged with different classes of power, and that Congress and the states may adopt measures similar in character in the execution of the powers committed to them; and that the same measures, or measures which are scarcely distinguishable from each other, or which approach each other so nearly as to be confounded, may flow from distinct powers and that this does not prove that the powers themselves are identical.

The powers, some alike, others distinct and exclusive, in character, lodged with the states and the nation for carrying out their respective purposes often appear to conflict, and the measures taken in their execution appear to interfere, until the objects or occasions inducing action establish the individuality of the powers finding exercise. It is in the field of those powers whereof exercise has been exclusively committed, either to the national government or to the states, that contests arise, for it is between a power of that character when exercised by the one possessing the authority and the more general power exercised by the other, in respect to an identical circumstance or occasion or having operation on the same object, that questions are presented whether such exclusive power of the one is abridged by the measure taken by the other.

When then, the national government, which possesses only certain enumerated powers, and the state governments, which retain all powers not delegated to the Union, make common use of measures with a view to the subjects

respectively committed to them, neither is exercising the power of the other. But when either thus proceeds in respect to a matter which is the especial concern of the other, that one is doing the very thing which such other is authorized to do.

These principles were enunciated by Chief Justice Marshall in *Gibbons v. Ogden,* 9 Wheat., 1, 199, 205. For the reason that one government is not sovereign which is subject to the will of another, the aid of these principles has been frequently sought in definition of the power of the national or state governments when questioned, in consequence of measures taken by them, as is shown by many decisions of this court.

In *Knowlton vs. Moore,* 178 U. S., 41, there was an exposition of the power of Congress exercisable in respect to taxation on the occasion of the transmission of property by death, wherein due regard to the foregoing principles was shown.

It is an axiom that "the positive authority of a decision is co-extensive only with the facts on which it is made." Expressions beyond the case may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision, *Cohens v. Virginia,* 6 Wheat, 264-399. But expressions necessary to a decision are controlling in a subsequent suit where the very point presented is the same. Thus *Knowlton v. Moore* stands as an authority for the imposition by Congress of a tax of the nature, operation and effect of that there considered. It is not an authority for the imposition of a tax of a different nature, operation and effect. But the delimitation of the power of Congress to impose taxes upon the occasion of the transmission of property by death,

necessary to that decision is controlling here, for the power or authority relied upon is necessarily the same.

It was observed by that decision that the transmission or receipt of property by death is a usual subject of taxation. It was also observed that the right and consequent power to regulate successions is vested in the states and not in Congress. Indisputably the taxing power of Congress, subject to compliance with the limitations of the Constitution, extends to all usual objects of taxation. Whilst conceding that proposition it was nevertheless urged as one of the major contentions against the validity of the tax there under consideration, that the power to regulate successions being exclusively vested in the states, as a necessary consequence Congress was without power to tax the transmission or receipt of property by death. Authority for the contention was sought in the decisions holding that as the states cannot impose burdens on the exclusive powers of the national government, or the means taken to execute them, so conversely the same limitations rest on the national government. The contention obviously assumed that the two powers finding exercise must come in collision, because the taxation imposed by Congress upon the transmission or receipt of property by death was an exercise of the states' acknowledged power to regulate successions or necessarily burdened that power. Thus the argument wholly overlooked *that at some point the power of the states becomes expended and regulation ceases*, and that in consequence from that point the inhibition upon the national government no longer has operation.

Manifestly at some point regulation must cease, and at that point an object or a subject arises which may be within the purview of other powers of the state and national governments. Hence, if the transmission or receipt of property

by death is a usual subject of taxation, then when the independent and exclusive power of the states to regulate that transmission shall have been exhausted or expended by the perfection of the rights concerning the thing transmission or succession on death involves, the power to tax possessed by the national government may extend and be applied to that subject. When thus considered, the power of the states and the power of the national government, having no claim to identity, and between which no analogy may be drawn, may find expression, each within its proper sphere, and have operation to the attainment of its own particular ends, in respect to the same situation or circumstance without resulting conflict, nor abridgement by one of any right or authority of the other.

That such was the conclusion reached by Chief Justice White, then Associate Justice, (for, were it otherwise the respective powers of the states and the national government must be mutually exclusive as respects many objects of taxation) is shown by the following excerpt from the opinion of the court, pp. 59, 60:

> " * * * the proposition denies the authority of the states to tax objects which are confessedly within the reach of their taxing power, and also excludes the national government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus, imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the state cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several states, because Congress may regulate interstate

commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are devested of those powers of taxation which from the foundation of the government admittedly have belonged to them."

The states may not tax imports nor impose burdens upon interstate commerce, because to do so must be a resumption of the power formerly possessed by them, and which they surrendered or delegated. On the other hand, the national government may not regulate successions, for so to do must be an assumption of the power to do the very thing the states are alone authorized. At some point the power to regulate imports has been attained. At some point as the result of exercise of the power to regulate interstate commerce property has arisen. At some point the power of the states to regulate conveyances, mortgages, etc. and all property and contracts which arise from its ownership finds its expression. And also, at some point the power to regulate successions has consummated its purpose in perfecting in the successors the rights yielded by the states, and in prescribing the conditions upon which those rights may be enjoyed. At that point the exclusive power of one authority ceases and the power of the other attaches.

The extraordinary situation of two distinct and in many respects independent governments over the same territory and the same people, each possessing not only powers

indispensable to its existence, but powers in respect to objects committed to its care preserved by restraints from interference, presents no little difficulty in holding the proper balance between those governments and their respective powers. As was said in *McCulloch v. Maryland,* 4 Wheat. 316: "Each is sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." But the questions nevertheless recur, where or at what point the control of one ceases, which enables full play of the power of the other, as illustrated in *Brown vs. Maryland,* 12 Wheat, 419; *Welton vs. Missouri,* 91 U. S. 275; *Leisy vs. Hardin,* 135 U. S. 100 and many other cases subsequently decided; and whether the measures taken by one are leveled against the legitimate powers of the other, as illustrated by *Cohens vs, Virginia, supra,* and more recently by such cases as *Galveston etc. Ry. Co. vs. Texas,* 210 U. S. 217, and *Western Union Tel. Co. vs. Kansas,* 216 U. S. 1.

These questions found solution in *Knowlton vs Moore,* as is shown by the opinion, which says:

> "Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate."

Is it not clear that that expression has force only when the object which is taxable by the national government is viewed as the transmission of property by death accomplished through the medium of the states' power? Or when it is considered that the power of regulation is the factor involved in transmission and that recognition thereto is given when seizure is made at the point where the power

expends itself in consummating rights in successors? When the states' power is thus viewed standing between the decedent and the successors, saying what shall pass and upon what condition, is it not the factor in transmission? How else may the power to regulate be given untrammelled exercise? It should be here noted that the above expression of Mr. Justice White was of the very essence of the decision, as was explained in the dissenting opinion in *Snyder v. Bettman*, 190 U. S. 249, 258, where he said:

> "This conclusion was absolutely essential to the construction of the statute in *Knowlton vs. Moore*."

To cast the burden so that it shall not fall on the power of the states in any case is possible obviously, only when the power of the states shall have been expended in respect to the objects of that power. That is to say, when the rights or privileges with which the power of the states has concern find consummation in consequence of the execution of that power, then has the states' regulation ceased, which enables the power of the national government to have operation. This is what was meant by the reference quoted above, concerning the right of the states to tax property once the subject of importation when commingled with the goods of the state, though imports are exclusively within the taxing power of Congress, and the right of the states to tax property engaged in interstate commerce, though such commerce be within the control of Congress. Upon any other theory the particular measure taken by Congress must be deemed to have been aimed at the power of the states, and to have denied to the recipient the right of using the privilege which he had purchased from the

state, until he should also have purchased it from the United States, which manifestly cannot be true. Pertinent is the remark in *McCulloch vs. Maryland, supra*:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission" * * *

Hence it is to be deduced, from the decision in *Knowlton v. Moore*, that when the states had expended their power by the introduction of "legacies and distributive shares," that thereby a subject of taxation was opened to the national government; and when it was determined that the tax in that case was imposed upon the "transmission or receipt of legacies and distributive shares" occasioned by death, and that the burden was upon the recipients and not upon the power of the states to regulate, that conclusion could have been reached only by regarding the tax as laid upon the *fact* of transmission or receipt of legacies and distributive shares produced and existing from the exercise of the states' power, and not upon the *act* of receiving legacies and distributive shares. Were it not so, obviously a condition must have been interposed upon the exercise of the states' power, or of the rights accorded legatees and distributees which were within the protection of that power until consummated.

So the delimitation of the power of the national government drawn in *Knowlton vs. Moore* (and again by Justice White in his dissent to *Snyder vs. Bettman,* 190 U. S. 249, 257), viz:

> "The United States not possessing, as the states do, the right to regulate successions, when the United States calls into play its taxing power over the subject

> of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the Constitution."

is conclusive upon the same question which the Estate Tax presents.

It thus appears that the decision in *Knowlton vs. Moore* in upholding the law there involved, as against the objection that it cast a burden upon the states' power of regulation, was based, not upon the ground that Congress had power to tax any subject within the protection of the states' power to regulate, but on the contrary the ground of the decision was that the tax there involved, being a burden cast solely upon the recipient, was a tax upon a subject, which had ceased to be a subject of states' regulation. Thus, the case of *Knowlton vs. Moore*, when viewed in the light of the principles here discussed, stands as an affirmative authority for the proposition that the power of Congress to tax transmission of property by death can only be lawfully exercised upon a subject, upon which the power of regulation of the state has been so far expended and its regulation so far completed as to introduce a new subject, open to the taxing power of Congress. The importance of bearing in mind the principles thus deduced from *Knowlton vs. Moore* will become more apparent when we reach the question of what is the operation and effect of the Estate Tax Act, wherein it will be shown, that the particular subject has not been changed in its identity as a subject of the states exclusive control, when intercepted by the particular mode of operation of the tax provided by said Act.

SECOND

The transmission of property on death is acknowledged to be within the exclusive power of the states to regulate, and all manifestations of that power are designed for the entire result and the production of a uniform whole, by the authority solely possessing the power.

The power to regulate a thing, is that power to prescribe the rule by which the thing is to be governed. "To regulate implies in its nature, full power over the thing to be regulated; it excludes necessarily the action of all others that would perform the same operation on the same thing." "A regulation when adopted is designed for the entire result, and the production of a uniform whole." *Gibbons vs. Ogden, supra.*

So, when the states attach certain privileges and exemptions to the exercise of the right to transmit or to receive property on death, over which their control is absolute, there must be implied a purpose to exercise that control. It cannot be doubted that at the time of the passage of the Act providing the Estate Tax, Congress found the several states in possession of this power; nor can it be doubted that all the states are by their laws asserting that power, and giving active operation to it, through their statutes of descent and testamentary succession, and measures of taxation predicated thereon.

Recognition of the right of the states to the exclusive exercise of that power is amply attested by a great number of decisions of this court reviewing state decisions, which had upheld a variety of state enactments making assertion of the power, on the grounds urged that such enactments

came in conflict with provisions of the United States Constitution, or treaties entered into by the United States, or burdened the instrumentalities of the United States.

Thus in *United States vs. Fox*, 94 U. S. 315, there was involved the validity of a devise of lands to the United States made by a New York testator, under a statute authorizing devises to be made to persons capable by law of holding real estate, and to corporations authorized by charter or statute to take. This court said:

> "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted * * * The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the state, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the state."

It was stated by Mr. Justice Holmes in the dissenting opinion in *Chanler v. Kelsey,* 205 U. S. 466, 479, 480 (premising his argument upon that very proposition, which was affirmed by the majority opinion in that case), that:

> "A state succession tax stands on different grounds from a similar tax by the United States or a general state tax upon transfers. It is more unlimited in its possible extent, if not altogether unlimited, and therefore it is necessary that the boundaries of the power

to levy such taxes should be accurately understood and defined.

"I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of property by inheritance or will upon the death of the owner,—a power which belongs to the states; and I have been fortified in my belief by the utterances of this court from the time of Chief Justice Taney to the present day, *Mager vs. Grima*, 8 How. 490, 493; *United States v. Perkins*, 163 U. S. 625, 627, 628; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288; *Plummer v. Coler*, 178 U. S. 115, 124, 126, 137; *Billings v. Illinois*, 188 U. S. 97, 104; *Campbell v. California*, 200 U. S. 87, 94; *Cahen v. Brewster*, 203 U. S. 543, 550; see also *Re Sherman* 153 N. Y. 1, 4. For that reason the power is more unlimited than the power of a state to tax transfers generally, or the power of the United States to levy an inheritance tax. The distinction between state and United States inheritance taxes was recognized in *Knowlton v. Moore*, 178 U. S. 41, 58, and whatever may be thought of the decision in *Snyder v. Bettman*, 190 U. S. 249, I do not understand it to import a denial of the distinction reaffirmed by the dissenting members of the court, 190 U. S. 256."

To this list of cases cited may be added *Prevost v. Greenaux*, 19 How 1; *Frederickson v. Louisiana*, 23 How. 445; *Orr v. Gilman*, 183 U. S. 278; *Blackstone v. Miller*, 188 U. S. 189, 207; *Board of Education v. Illinois*, 203 U. S. 553, 562, 563; *Tilt v. Kelsey*, 207 U. S. 43; *Keeney v. New York*, 222 U. S. 525; *Peterson v. Iowa*, 245 U. S. 170, 173; and *Maxwell v. Bugbee*, 250 U. S. 525.

Brief references to a few of the cases may be permitted to show how explicitly this court has recognized the nature of the power exercised by the states, viz.:

United States v. Perkins, 163 U. S. 625, concerned the taxability under the New York law of a bequest made by

a testator to the United States. The tax having been sustained by the New York Court of Appeals, in *Matter of Merriam,* 141 N. Y. 479, against the contention that the state had no power to tax the property of the United States, on writ of error this court said:

> "We know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.
>
> "In this view, the so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus, the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

In *Billings v. Illinois,* 188 U. S. 97, it was asserted that the Illinois inheritance tax law, denied the equal protection of the laws guaranteed by the 14th Amendment, and this court said:

> "We must regard the power of the state over the testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based."

Board of Education v. Illinois, 203 U. S. 553, involved the exclusion of foreign corporations from the exemption allowed by the Illinois law on property devised for educational purposes. The act was claimed to be an abridgement of the privileges and immunities of citizens of the United States, or a denial of the equal protection of the laws. This court said:

> "It must be kept in mind that the controversies in this case depend upon the power of the state over inheritances, and the conditions she may put upon them in the exercise of that power * * * A Federal court would hesitate indeed to put impediments on this power or declare invalid any classification of persons or corporations that had reasonable regard to the purposes of the state and its legislation."

Plummer v. Coler, 178 U. S. 115, there involved was the question of the taxability under the New York Transfer Tax Act of a legacy consisting of United States bonds, in the face of the Federal statute declaring such bonds exempt from state taxation in any form. It was urged against taxability, that there was an inherent lack of power in the state to tax because of the restraint, and that the tax impaired and burdened the borrowing power of the United States and was therefore unconstitutional. Nevertheless this court said:

> "* * * we may regard it as established that the relation of the individual citizen and resident to the state is such that his right, as the owner of property to direct its descent by will, or by permitting its descent to be regulated by the statute, and his right as legatee, devisee or heir to receive the property of his testator or ancestor are rights derived from and regulated by the state."

What is observed particularly in the cases of *United States v. Perkins* and *Plummer v. Coler,* is, that this court did not seek to place the exercise of power upon an unwarranted right to tax but, on the contrary yielded to and expressly affirmed the plenary power of the state to regulate successions.

Peterson v. Iowa, 245 U. S. 170, concerned the validity of the Iowa law imposing death duties on legacies to non-resident aliens at a higher rate than those imposed on legacies to residents of the state; and the claim was made that the act violated "the most favored nation clause" in a treaty between the United States and Denmark. Chief Justice White said:

> "It is obvious that the article places restrictions upon the authority of the respective countries to impose taxes, duties or charges under the circumstances and conditions for which it provides * * * the case here presented concerns only the power of the state of Iowa to deal with a citizen of that state and her property there situated, while the prohibitions of the treaty, giving to them their widest significance, apply only to a citizen of Denmark and his right to dispose of his property situated in the state of Iowa."

The distinction between the power to regulate and the power to tax was here observed, for had the power put in exercise been the power to tax, manifestly it would come into collision with the provisions of the treaty.

The principle thus recognized in *Knowlton vs. Moore* has never been denied, nor in any respect modified. Since but two cases (*Murdock v. Ward,* 178 U. S. 139, decided at the same term, and *Snyder v. Bettman*, 190 U. S. 249, arising later) concerning the tax on legacies and distributive shares imposed by the Revenue Act of 1898, have dealt with

the principle established by it. Both were decided upon its authority. *Murdock v. Ward* involved the taxability of United States bonds. The contention against the validity of the tax was that "Congress had no right or authority to impose or assess any tax" upon the bonds of the United States. The decision was placed upon no assumption of a right to regulate on the part of the United States, but upon its power to tax an object existing perforce of the state laws. The validity of the tax was rested solely upon the principle that a non-taxable factor may be employed to measure a tax upon a subject within the taxing power.

Snyder v. Bettman involved the taxability of a legacy given to a municipality in Ohio. Though expressions not necessary to the decision were given in the majority opinion, it is clear that the only point of difference between the concurring and dissenting Justices was in respect to subjecting an instrumentality of a state government to a tax. Whilst conceding that Congress had no power to regulate successions, nor to burden a state or its municipal corporations the majority were of the opinion that the tax being "incidental" or indirect was therefore not objectionable as a burden on such instrumentality. The dissenting Justices held the view that the tax extended to an object which Congress "has no power under the Constitution to tax at all, either directly or indirectly."

The principle extracted from a review of the cases cited, that the subjection by the states of the "right or privilege of transmitting" or the "right to dispose" (as defined in *United States vs. Perkins, supra*); the "right to inherit property; or to receive it under testamentary disposition" (as defined in *Maxwell vs. Bugbee, supra*) or the right or privilege to take by devise or descent (as defined in *Magoun v. Illinois Trust & Savings Bank, supra*), however various-

ly termed, to the burden of a tax, is a mode or measure adopted in regulaton of transmission or receipt of property by death, *and is an exercise of the power in that respect by the authority solely possessing it;* and, the individuality of the power being thus established, that no interference or restrictions upon the exercise of that power *in any of its manifestations* may be made by the United States, short of giving effect at most to such limitations as are prescribed, or attach t· all free governments, for the maintenance of equality and freedom from arbitrary or discriminatory action.

From the review of the principles enunciated by the foregoing cases there can be no doubt that that is the firmly established doctrine of this court. It is true that in *Scholey vs. Rew;* 90 U. S. 331, the court in referring to the Federal tax there involved said that it was "plainly an excise tax or duty" upon "the devolution of the estate or the right to become beneficially entitled to the same or the income thereof in possession or expectancy," but that expression was used solely for the purpose of meeting the objection that the tax was direct; the question of the exclusive power of the states not being there involved as was pointed out in *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S. 429, 578, where this court said:

> "The distinction between the power of a state and the power of the United States, to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court." (Cited and quoted in *Knowlton v. Moore,* p. 80.)

It is obvious therefore that in view of the full recognition of the states' exclusive power accorded in the cases above reviewed, all of which were decided subsequently to

Scholey vs. Rew, the court's expression in that case that the tax there involved was upon "the devolution of the estate or the right to become beneficially entitled" must stand limited as being a tax upon a subject upon which the states' power of regulation had been fully expended.

Indeed, an examination of the decisions of this court involving taxes when imposed by Congress on the occasion of the transmission of property on death, clearly discloses that the taxes there considered *were in fact and in terms imposed upon subjects which had been introduced through the exercise of the states' power of regulation, and after that power had been expended thereover. Scholey vs. Rew, supra; Clapp vs. Mason,* 94 U. S. 589; *Wright vs. Blakeslee,* 101 U. S. 174; *Mason vs. Sargent,* 104 U. S. 689; *Sturges vs. United States,* 117 U. S. 363; and *United States vs. Marion Trust Co.,* 143 Fed. 301, aff. 206 U. S. 567 without opinion, and later cases dealing with refundment of taxes under the 1898 Act.

THIRD

The true test of the validity of the Estate Tax depends upon its operation and effect as enforced, and not upon the manner in which the taxing scheme has been characterized. So viewed, the Act clearly casts a burden upon or usurps the power of the states to regulate transmission of property on death.

The argument thus far has sought to define the boundaries of the power of the United States to superimpose

a tax upon a subject over which the states have the exclusive power of regulation, exercised by their laws of descent and testamentary disposition supplemented by a mode of taxation, so that in the examination of the character of the Estate Tax, the subject matter upon which imposed, and the operation and effect of the tax, it may be ascertained whether those boundaries are or can be observed.

Before examining, however, the character of the Estate Tax or the subject matter upon which imposed, as it is characterized by the language of the statute, let us first consider the operation and effect of the tax as enforced, as an aid to the solution of the question whether or not the exaction is beyond the taxing power of the United States.

(a) The operation and effect of the tax as laid and measured, and not the subject of taxation, determines whether a burden is cast upon the state's power of regulation.

At the outset it should be borne in mind that in *Knowlton vs. Moore* it was determined, that the subject of taxation was "the transmission or receipt of property by death"; that transmission of property by death was a matter within the power of the states to regulate and not within the power of the United States; that Congress could not burden that power; that the tax was measured by the value of each legacy and distributive share, and hence *no burden was cast on the states' power to regulate*, but rested wholly on the recipients. In other words, the natural operation and effect of the tax was such as to allow untrammelled operation of the states' power of regulation exerted to the point of consummation in legatees and heirs of legacies and distributive shares.

That the validity of a tax, in operation and effect, does

not alone depend upon the selection of a valid and lawful subject of taxation is clearly demonstrated in those cases where states have imposed taxes upon corporations engaged in interstate commerce. The subject of taxation is generally the privilege of exercising the corporate franchises within the state, or the property therein employed in business,—a subject admittedly legitimate. The impositions take the form of license fees or of taxes on property, measured by a variety of standards. The states may not of course burden the Federal interstate commerce power, and whether a particular tax does or does not burden such power depends upon the operation and effect of the tax, and not upon the subject of taxation, as is shown by numerous cases, among which are: *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1; *Gloucester Ferry Co. vs. Pennsylvania,* 114 U. S. 196; *Philadelphia & S. Mail S. S. Co. vs. Pennsylvania,* 122 U. S. 326; *Meyer vs. Wells, Fargo & Co.* 223 U. S. 298; *Galveston, H. & S. A. R. Co. vs Texas,* 210 U. S. 217; and *Fargo vs. Hart* 193 U. S. 490; where the subjects of taxation were such corporate franchises or privileges, or property employed, and the taxes were measured by the amount of the entire capital stock employed in interstate commerce, or by the amount of dividends declared out of earnings from all sources, or by the amount of gross receipts derived from tolls or transportation in interstate as well as intrastate business.

Thus, in *Western Union Telegraph Co. vs. Kansas, supra,* where the state of Kansas attempted to exact a tax of the Western Union Telegraph Company under the name of a "charter fee," of a given per cent of the entire authorized capital of the company, this court in holding that the operation and effect of the statute was to cast a burden on interstate commerce said, among other things:

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state, a condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the *basis* on which the fee specified in the state statute rests. That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is a given per cent of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas, and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property wherever located, and, in terms, makes it a *condition* of the company's telegraph right to transact purely local business in Kansas that it shall contribute, for the benefit of the state school fund, a given per cent of its whole authorized capital representing all of its property and all its business and interests everywhere."

Further illustration may be found in a large number o cases decided by this court involving the question of prop erty taxes levied by states on goods in transit, collected i 12 *Corpus Juris*, page 98, Section 128, where the propositio is thus clearly stated:

"A state tax on oil, goods, live stock, or other property in transit from one state to another is void, and it is immaterial whether the tax is laid by the state of origin or the state of destination. In the one case the protection of the commerce clause has attached, and in the other such protection has not ceased"

It is unnecessary to multiply the cases. Those cited clearly enunciate the principle, that though measures be taken in respect to lawful objects by the imposition of taxes upon legitimate subjects of taxation, nevertheless the tax may be so laid or measured that in its operation and effect the burden becomes so cast as not to bear solely upon the rightful thing, but immediately and directly upon the exclusive power of another sovereignty.

If such a burden bears upon the exclusive power of one sovereignty so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form. *Stockard vs. Morgan* 185 U. S. 27, 37; *Asbell vs. Kansas,* 209 U. S. 251, 254, 256; *Western Union Telegraph Co. vs. Kansas, supra,* p. 24.

Whether measures taken by the states on the one hand and by the national government on the other, come in conflict, can, when the individuality of the respective powers are established, be arrived at, only by determining from the operation and effect of the measure taken by one whether a burden is cast upon the exclusive power of the other. *Gibbons vs. Ogden, supra*; *Brown vs. Maryland, supra*; *Cohens vs. Virginia, supra; McCulloch vs. Maryland, supra; Almy vs. California*, 65 U. S. 169; *Collins vs. New Hampshire,* 171 U. S. 30; *Galveston, H. & S. A. R. Co. vs. Texas, supra; Western Union Telegraph Co. vs. Kansas, supra; International Paper Co. vs. Massachusetts,* 246 U. S. 135; *Looney vs. Crane Co.* 245 U. S. 178; *Crew*

Levick Co. vs. Pennsylvania, 245 U. S. 292; *Wallace vs. Hines,* —— U. S. —— (Decided May 3, 1920, reported in L. Ed. Adv. Ops. 500).

As was said in *Kansas City, F. S. & M. R. Ry. Co. vs. Botkin,* 240 U. S. 225, in discussing whether a state exaction burdened the interstate commerce power of the national government:

> "In determining whether a tax has such a direct relation to interstate commerce as to be an exercise of power prohibited by the commerce clause, our decision must regard the substance of the exaction—its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized. * * * A tax may be in form a privilege tax and yet in substance, may be a direct tax on property." * * *

And again, in *Mugler vs. Kansas,* 123 U. S. 623:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

Such is the established rule of constitutional construction. *Western Union Telegraph Co. vs. Kansas, supra;* and cases cited.

(b) It is wholly immaterial that a burden was not intended to be cast upon the state's power, if the Act operates as such its validity cannot be sustained.

That the Act in imposing this tax upon the "transfer of the net estate" imposes the tax upon the mass of the estate, rather than upon the interests produced as the result

of the states' regulation, is not open to serious argument. *In re Hamlin*, 226 N. Y. 407, 7 A. L. R. 701; *Plunkett vs. Old Colony Trust Co.*, 233 Mass. 471, 7 A. L. R. 696.

The same transfer sets in operation the states' power of regulation and the tax in question. The same property is the concern of each. By the very design of the Act in respect to the measurement of the tax and the manner in which laid, it seems intended and purposed to have operation and effect in utter disregard of the states' acknowledged power, by intercepting the exercise of that power, reaching over and withdrawing from operation and appropriating to its purposes the very object which the states' power especially concerns, but whether intended as such or not is wholly immaterial if the Act operates to cast a burden upon the states. In *Crutcher vs. Kentucky*, 141 U. S. 47, this court said:

> "These regulations (speaking of the Kentucky statute requiring licenses of foreign corporations) are clearly a burden and restriction upon that commerce. Whether intended as such or not, they operate as such."

Also in *Minnesota vs. Barber*, 136 U. S. 313, 319, 323, where a state statute was assailed as a burden on interstate commerce, this court said:

> "There may be no purpose on the part of the legislature to violate the provisions of that instrument and yet a statute enacted by it under the forms of law, may, by its necessary operation be destructive of rights granted or secured by the Constitution." * * *

That such is the operation and effect is borne out by the interpretation of the Commissioner of Internal Revenue

in the Regulations 37 promulgated pursuant to the provisions of the Act, reading as follows:

"ARTICLE 1. Neither a property nor a legacy tax. —The Federal estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property but upon its transfer from the decedent to others. The subject of tax is the transfer of the entire net estate, not any particular legacy, devise or distributive share. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent have no bearing upon the question of liability or the extent thereof. The transfer of property is taxable, although it escheats to the State for lack of heirs.

"ARTICLE 2. Nature of transfer.—The statute embraces transfers by will or under the intestate laws, and also transfers made by the decedent in his lifetime, when made in contemplation of death or intended to take effect in possession or enjoyment at or after his death. The statute also enumerates certain special cases not strictly of either character just described. The practical test of the existence of a taxable transfer is whether the statute directs that the property in question be included in the gross estate."

"ARTICLE 46." (Which has reference to the deductions authorized by Sec. 203 of the Act) * * * "No estate, succession, legacy or inheritance tax is deductible."

(c) The Federal power to tax on the occasion of transmission of property on death, must be governed by the state's exclusive power of regulation of that subject, and its full execution.

As before stated, "the sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission." *McCulloch vs. Maryland, supra;* and "a regulation when adopted is designed for the entire

result, and the production of a uniform whole," *Gibbons vs. Ogden, supra.* Regulation of transmission and descent is designed, and is exerted to produce a certain result. It deals with all the property within the states' dominion, and effects its disposition upon the occasion of the owner's death, to and among those designated from considerations of policy, in accordance with a general and uniform plan defining and specifying the portions of each on the basis of value. The result sought by the state may only be produced by entire freedom of action, throughout the whole course of transmission from the instant of death, which is the very point where the power of regulation is brought into exercise, until the full rights of the persons who shall stand as successors are defined and produced. The "interest that ceased on death" is the primary thing with which the state power deals. The right or privilege of the owner of property to transmit it on his death, or the exercise of that right or privilege is the very first step in state regulation, or the inception of regulation.

An exercise of that authority thus becomes the prime factor in the transmission of property. And when that factor is found standing in position between the decedent and the successors saying what shall pass from the decedent and be taken by the successors, and prescribing the conditions upon which the same may be done, it must stand admitted to have been designed for the entire result, and to produce a uniform whole. What is that result, but the definition of specified rights to what has passed? It is then only, and not before that result is produced by force of the states' laws, that the states have introduced a subject, or a definite thing, which is given existence by their authority.

If these propositions be admitted, as indeed they must,

it follows as a necessary consequence that the Federal power to tax the transmission of property by death is and must be governed by the states' power and its full execution, and, therefore can extend only to what shall have been introduced by the states' permission.

What subject may be deemed to have been introduced by the State of New York in view of the language of a recent case, *Matter of Watson*, 226 N. Y. 384, 399, when the Court of Appeals say respecting its so-called "transfer tax" law:

> "The beneficiary has no claim to the property of an ancestor except as given by law, and, if the state has a right to impose a tax at all upon the passing of property, the transferee takes only what is left after the tax is paid."!

What subject is deemed to be introduced by the California laws of descent and taxation of inheritances, when it is said in *Stanford's Estate*, 126 Cal. 112:

> "It is only by virtue of the statute that an heir is entitled to receive any of his ancestor's estate; and the legislature can provide that the whole or any portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and the legislature in this case having determined that 95 per cent of the decedent's estate may go to his heirs, and that 5 per cent be retained by the state, it is too clear for argument that this 5 per cent vested in the state at the same time that the other 95 per cent vested in the heirs."?

If any state should say, for instance, that a person shall take by will or descent from any decedent domiciled therein, but ninety per cent or fifty per cent of the amount of any legacy, bequest or distributive share from property

within such state, and that as a condition entitling him thereto the balance shall be taken by the state (and this in substance and effect is what is said by such state laws, barring only the rate of the tax), upon what may Congress impose and fasten a tax? May it tax the one hundred per cent passing from the decedent? May it tax the ten per cent or the fifty per cent that the state has exacted as the condition upon upon which the successors may take the balance? Or can Congress only tax what each successor has derived in consequence of the exercise of the states' power?

(d) The operation and effect of the tax is to render the states powerless to regulate transmission of property on death in the manner sought by their measures.

So the individuality of the states' power being established as a regulation of the transmission of property by death, the crux of the problem here is whether the operation and effect of the Estate Tax as enforced, results in casting a burden upon that power? What is the operation and effect of the tax?

This tax by reason of its progressive scale and the specific exemption of $50,000 interferes with and denies to the states the general, equal and uniform operation of their laws of descent and the laws respecting the transmission of property by will, in this: that the interests of persons taking as heirs, or legatees, or devisees, are thereby varied and changed in amount not generally nor uniformly, but in the same degree that the rate applicable to the estate from which derived is made to progress or vary by reason merely of the size of the estate. Thus, the interests of persons taking by descent or by will, derived from an estate

not subject to the tax are unaffected; those derived from an estate subject to the minimum tax, are diminished one per cent; and the interests of persons likewise derived from an estate subject to the ascending rates are diminished from two per cent to approximately nine and one-half per cent depending on the value of the estate. Thus it comes to pass that a thing of certain value is diminished two, three or up to nine and one-half times as much in one man's hands as a thing of equal value is in the hands of another. Or, one man is compelled to forego even nine and one-half times as much as another for the same or equal thing acquired admittedly perforce of the states' authority.

Again, by reason of the specific exemption allowed upon all estates and by reason of there being no provision for exempting or deducting transfers of property made by decedents for public or charitable purposes expressly favored and encouraged by state enactments, further interference with the regulations undertaken by the states to secure a general and uniform operation and effect of their laws, is produced.

These questions respecting interference with the powers and regulations of the states may not be readily dismissed, nor answered, by saying that if the burden of the Estate Tax is or may be placed upon the estate or upon the shoulders of the successors, therefore it is not upon the power of the state to regulate; or by saying that if the state be allowed to deduct the full amount of its inheritance taxes before computation of the Estate Tax, therefore the burden cannot be upon the states' power.

In *Knowlton v. Moore,* when it was determined that the phenomenon subjected to taxation was the "transmission or receipt of property by death" and that the tax was measured by the value of separate legacies and distributive

shares, thus conceding full operation to the states' power of regulation, the conclusion was irresistible that the tax was a "burden cast upon the recipient, and not upon the power of the state to regulate." Thus a separate and independent tax was imposed upon the very act or fact *which performance of regulation consummated,* and being measured by the same thing or the same unit, obviously the burden was cast upon the recipient. In short, the thing which was seized upon by the tax was the thing produced by the state regulation, and in consequence a burden upon the power was an impossibility.

It may be further emphasized that the determination in *Knowlton v. Moore* that the burden was cast upon the recipient and not upon the power to regulate, was the inevitable conclusion drawn from certain antecedent propositions when established, and was not an arbitrary assumption. Those antecedent propositions so established were these: that the power of Congress to tax extends to all usual objects; that the transmission and receipt of property by death is a usual object of taxation; that the power to regulate transmission of property on death resides in the states and not in Congress.

Hence, when those propositions were established, taxability of the transmission or receipt of property by death by Congress necessarily rested upon the thing which was produced through the medium of the states' power, or that which emerged in virtue of the exercise of that power, which was nothing else but the interests which had become vested and consummated in the successors, to-wit: legacies and distributive shares. Were any doubt that any other conclusion could be reached it must be set at rest by the dissenting opinion of Mr. Justice White in *Snyder v. Bettman*, 190 U. S. 249, 258, which illuminated his opinion,

in *Knowlton v. Moore.* He there said: referring to such conclusion, quoting the conclusion in question:

> "Certainly, a tax placed upon an inheritance diminishes, to the extent of the tax, the value of the right to inherit or receive, *but this is a burden cast upon the recipient*, and not upon the power of the state to regulate.
>
> "This conclusion is absolutely essential to the construction of the statute in *Knowlton v. Moore.*"

So, here if it be argued that the burden of this tax is upon the estate or upon the successors, and is not upon the power to regulate, that contention assumes the very point in dispute. That argument begs the question for decision, which is whether the operation and effect of this tax casts a burden upon the states' power to regulate. It is obvious that if the power of the states to regulate is impeded, retarded or abridged in its exercise, or may not be exerted to its full strength or measure respecting the subject matter that a burden is cast upon such power. Would not the argument in *Western Union Tel. Co. v. Kansas, supra,* that the burden was on the telegraph company because it must pay the tax; or a similar argument in *Galveston, H. & S. A. R. Co. v. Texas, supra,* that the burden was on the railway company because it must pay the tax; or in *Brown v. Maryland, supra,* that the burden was on the importer because he must pay the tax, and therefore was not in any of the cases a burden upon the interstate commerce power of Congress, be the baldest possible assumption of the very point in dispute, or a form of begging the very question to be determined, namely: whether the operation and effect of the particular measure burdened such power?

Here the very question is, whether the operation and effect of this tax burdens, impedes or abridges the power of the states to regulate the transmission of property by death or prevents full and effective operation of that power in view of the manner this tax is laid.

Now, in respect to this tax, measured by the volume of the estate and not by the thing which state regulation has produced, either one of two results must follow, viz.:

> 1. The withdrawal from operation of state regulation of an amount of the estate equal to the sum of the tax before that regulation may function; or
>
> 2. The augmentation of the burden which the state power in functioning casts upon the successors, or the imposition of a condition which the state must yield to in performing its function.

In other words, the states' power is robbed of its exercise to the extent of the tax, or else that power is burdened in its exercise to the same extent, which comes to the same thing.

The right to tax the estate to any extent, when passing from a decedent, must operate upon the power to regulate transmission of the estate *before the power is exercised,* and have a sensible influence and effect on the states' power to regulate. The case of *Weston v. Charleston*, 2 Pet. 449, concerned the taxation by the City of Charleston of stock or bonds of the United States held by its citizens, and in respect to the question how and when such taxation operated to burden the borrowing powers of the national government, Chief Justice Marshall said:

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it

is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

Were the propositions and the conclusions drawn therefrom to be disputed, concrete illustrations must demonstrate their soundness.

Reference to the Act shows that in the computation of the tax, for example, an estate of $50,000 (by reason of the exemption of that amount) is subject to no tax; a "net estate" of $50,000 is subject to a tax of $500; and a net estate of $10,000,000 is subject to a tax of $841,000. In the case of A, the sole heir or devisee of the first estate mentioned of $50,000, the state regulation defining and measuring his right thereto is allowed full operation because of the exemption. In the case of B, entitled to take as sole heir at law or by will, the "net estate" of $50,000 above mentioned, diminution is suffered to the extent of $500. In the case of C, entitled to take as heir at law or by legacy or devise the sum of $50,000 from the $10,000,000 estate above mentioned, diminution is suffered to the extent of $4,205.

In the first case no burden rests upon the state's power. In each of the other cases a burden does rest upon that power which has been exerted to produce in B and C things of equal value. By reason of withdrawal from those estates of the amount of the respective taxes therefrom, that state power is impotent to consummate in B and C that which it accords them, or else in according to them those benefits another and independent authority has assumed to add or impose conditions upon the acquisition of

those benefits, or to augment in greatly varying degree the conditions the state has seen fit to impose thereon. Either the state is powerless to effect transmission in B and C of the same thing or a thing of the same value which it effects in A, through laws designed to produce a uniform result under like situation; or the state in effecting transmission in A, B and C of things of equal value (which for uniformity of result their like situation compels) suffers an inability so to do except by allowing another and independent authority to exact nothing from A, $500 from B and $4,205 from C, before that result is reached. Thus no separate and independent burden, as resulted in the Knowlton case, is cast upon that which performance of regulation consummates, but a burden is cast upon the performance of that regulation.

All states provide certain exemptions from their burdens for widows and children of decedents, and usually provisions made for public charities or municipal purposes are wholly exempted therefrom, from highest considerations of legislative or public policy. Let us suppose that the decedent leaving the "net estate" of $10,000,000 has provided one-fourth for a public charity or a municipal purpose, which is exempted from burden on the part of the state, nevertheless that provision by this tax suffers diminution in the sum of $210,250, or else others must shoulder that much greater burden.

It is undoubtedly true that the Federal Government *when taxing within its lawful power* is not bound to recognize exemptions of subjects created or allowed by the states. But that principle may not be extended so as to deny to the states the power, nor to embarrass the states in the exercise of power, to make such exemptions from the operation of their own measures as their legislative

policies may dictate. The following propositions are self-evident: whatever diminishes an estate produces an immediate and direct diminution of equal amount in some share or shares in that estate. Whatever diminishes an estate before regulation of descent or succession has operation diminishes in equal amount immediately and directly that upon which regulation may operate. So, when the estate stands diminished before regulation is allowed to operate, that regulation or the power to regulate must be ineffectual to accomplish to the extent diminution has been suffered, that which is sought by it. On the other hand, when regulation of descent or succession is allowed full operation upon an estate, it is of course fully able to effect its purpose in respect thereto. Whenever regulation of descent or succession effects its purpose, then what remains subject to diminution is nothing but the several shares which such regulation has produced. Hence, when the shares which have been produced as the result of regulation, are then diminished in consequence of the exertion of the power by another taxing authority, the burden falls not on regulation, nor the power to regulate because it has performed its function, but on the shares themselves or the recipients of those shares.

Now, when a state declares that legacies for charitable or municipal objects shall pass *in toto* exempt from *any* burden, or that provisions for widows and children shall be partly exempt, it undertakes to produce a result which it is admittedly qualified to do. In the attainment of that result it has not undertaken to say, that therefrom or thenceforth such objects shall be or stand exempt from the burdens cast by another taxing authority. So, if such an estate suffers diminution through interposition of another taxing authority, either before or during operation of the

state's measures, the state is powerless to effect the result undertaken, just to the extent diminution has been suffered. If that result sought be to pass a definite amount or thing free from any intermediate burden, then, it is obvious that the interposition of such a burden by another taxing authority between the grant of the thing and the consummation of the grant, arrests the function of the state's power in respect to the result sought. In other words, the interposition of such a burden denies to the state the rightful exercise of the power to grant the particular exemptions. On the other hand, were that power allowed to fully function an object or thing is thereby introduced, to which the Federal taxing authority may or may not grant exemption as it sees fit. If the Federal authority grants no exemption from its burdens, no burden rests on the state's power in consequence, but solely on such object or thing or the recipient of it.

Thus the difference between the operation and the effect of a tax which denies, impedes or abridges the full exercise of regulation and one which is predicated upon the fact which full exercise of that power consummates, is at once apparent. If the national government shall, through a measure of progressive taxation step in and withdraw varying amounts from subjects, or attach burdens thereto, *before the state may exert its power in respect to those subjects, or in disregard of what that power seeks to perform*, the operation and effect of such a measure is to deny to the state the authority possessed respecting a matter acknowledged to be its especial concern, and to assume regulation of those subjects admitted to be within the control of the state.

For the reason that the measures taken by the state to regulate transmission of property on death thus may not

have their lawful operation and effect, it becomes at once apparent that the mere allowance to the state of the right to deduct its revenue or so-called inheritance taxes before computation of the Estate Tax in nowise clears the matter. That revenue is exacted for the production of a certain result. That result is not produced by receipt of the consideration but by performance of the thing for which a consideration is exacted.

Respecting the operation and effect of the Estate Tax, a very similar question was presented by an Act of the General Assembly of Pennsylvania, whereby a tax was imposed upon all personal property passing by will or intestate law, (less deductions for debts, etc.); provided that personal property to the amount of $5,000 in all estates should be exempt. The Constitution of the state provided that "The General Assembly shall not pass any local or special law * * * changing the law of descent or succession."

The validity of the Act in view of the constitutional provision was attacked in *Estate of Cope*, 191 Pa. St. 1. (s. c. 45 L. R. A. 316) the Court there say:

> "The act in question has none of the features of an intestate law, or of any act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a wills act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation would pass from the then, as well as subsequent owners thereof to others, or had theretofore passed and become vested in others prior to the date of the act under consideration. * * *

"As our laws of descent and succession stood prior to the passage of the 'direct inheritance tax law', the personal property specified in said act was never subject to any 'burden, bonus, excise, or assessment' whatever. The pre-existing law of succession is changed by that act, in that it imposes a burden on so much of said property as is in excess of five thousand dollars, and leaves it unchanged as to the residue. It is, therefore, a special and not a general act, because it does thus impose a burden on a part of said property, and declares that, in all estates, personal property, not exceeding five thousand dollars in value, shall be exempt from said burden. It thus changes the law of succession as to part of the property specified therein, and attaches a condition to the right of succession which is neither general nor uniform, in that the burden is not imposed upon all distributees or all estates of decedents, but only upon a portion of them arbitrarily selected, while others in precisely the same class are exempted therefrom. * * * On the commonwealth's own assumption, therefore, the act is a special law changing the law of successions, and is clearly forbidden by article 3, section 7, of the Constitution."

The principle of that case has direct applicability here. There the general power to tax came squarely in conflict with that other power to regulate descent or succession subject to a certain limitation, and in consequence the measure taken was obliged to yield to the overriding authority of the power to regulate, for otherwise the measure taken *assumed to do the thing prohibited.* There the act, by reasons of the exemption of $5,000 and the tax of two per cent, changed the general law of descent and succession in allowing persons entitled to $5,000 or less to take what the general law gave them, and in not allowing persons entitled to amounts above that sum to take within two per cent of what that law gave them. Here, the Act, by reason of the

exemption of $50,000 allows persons entitled to an estate so exempted to take what the state laws give them; but changes the state laws of descent and succession in not allowing persons who are entitled to net estates above $50,000, by reason of the tax thereon ranging from one per cent to ten per cent, to take within one to approximately ten per cent, as the case may be, of what the states declare they shall have perforce of general and uniform laws determining descent according to relationship, and distribution under wills, applicable to all estates, large or small.*

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*(Note). Since the preparation of this brief, the attention of counsel has been called to the discussion of the question by Dr. Carl C. Plehn of the University of California in his "**Introduction to Public Finance,**" 4th Ed., revised 1920 (Macmillan), wherein, at p. 215, the same conclusion is reached. He there says:

> "CONSTITUTIONALITY OF FEDERAL TAX.—There is doubt as to the constitutionality of this tax. Under the Constitution all law relating to property rights and in regard to the devolution of property is state law. Congress may not deprive the states of the power to establish the right of succession and of bequest nor can it limit or abridge those powers. The power to tax is the power to destroy. If by taxation Congress takes away part or all of the value of property left by a decedent it takes the kernel of the state's right and leaves the shell only. When the inheritance tax of 1898 was before the courts it was first decided that the tax was upon the distributive shares, and was a 'burden cast upon the recipient and not upon the power of the state to regulate.' The whole argument implies that a tax imposed on the net estate of the decedent and thus directly impinging on the determination of the devolution would be invalid as limiting the power of the state in its own proper field. There is a distinct difference between this estate tax and one on the transfer or right to receive property after the state, by exercise of its powers, has established the right. If, as may be contended, the estate of a deceased person passes first to the state and remains for a time in custody of the state, the federal tax is a direct attack on the state itself. If, on the other hand, the estate of the deceased, is, on the very instant of death, broken up into the several estates of the heirs and legatees, it breaks up only by virtue of and in accordance with the laws of the state, which are nullified or vitally amended by the interposition of the federal tax and the seiz-

Hamilton said in *"The Federalist,"* No. XXXI:

"The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. *Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any state; would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state?* Suppose again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a state, would it not be equally evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its constitution plainly supposes to exist in the state governments?" (Italics ours.)

"To what purpose," it was said in *Marbury v. Madison*, 1 Cranch, 137, 176.

"are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation."

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ure by the federal government of part of the estate precedent to the distribution. The argument in Knowlton v. Moore (178 U. S. 41), rests wholly on the fact that having decided first that the tax before the court fell on the distributive shares the court could then claim that the state had finished the exercise of its reserved powers and there was no barrier for Congress to step in and tax. But the matter is wholly different where the tax is on the estate, before distribution or while in the custody of the state. Probably the courts will be called upon to pass on this point."

How more certainly could a measure taken by Congress be leveled at the legitimate powers of the states actively and constantly drawn into exercise upon the death of citizens? The conclusion is irresistible that if the Estate Tax shall have operation and effect, Congress thereby assumes to do what the states are alone authorized, and undertakes regulation or participates in regulation of a subject within the states' exclusive power.

The right of Congress to tax within its delegated power is unrestrained, except as limited in mode by the Constitution, and "the judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties," *McCray v. United States*, 195 U. S. 27, 61.

Tested by the principle that a lawful taxing power "acknowledges no limits but the will of the legislative body imposing the tax," which is to say, that the lawful power may be exerted to the point of destruction without being constitutionally invalid for that reason, it is at once apparent that if Congress should impose a tax upon the interests and benefits, which the states produce through their measures taken in regulation of transmission of property by death, to the extent of one hundred per cent of their value, no burden whatsoever in operation and effect would be cast upon the power of the states; the burden would be wholly on the objects or things so produced or the recipients of those things.

On the other hand, if Congress may tax in the mode of this tax, by an increase in rates to the extent of one hundred per cent of estates passing on death, it is too obvious to require discussion that the operation and effect of such tax must be to extinguish all power and voice on part of the states in the transmission of property by death. It is

equally obvious that any tax having the operation and effect of this tax, short of a one hundred per cent rate, burdens, impairs, impedes and embarrasses the states in the performance of transmission of property by death. For these reasons the burden cast is not incidental but immediate and direct.

Or if Congress should so amend the Act as to increase the present rates of taxation to one hundred per cent on all "net estates" in excess of one million dollars, (since the initial Act of 1916, the maximum rate has been increased to twenty-five per cent on all net estates of $10,000,000 and upwards), what power could be said to be manifested by such an increase or readjustment of rates? The power of taxation? Is it not palpable that the operation and effect of such an increase in the rate of taxation would be to limit the amount of property that may be disposed of on death? Is it not at once clear that it must deny to the states any voice whatsoever in respect to whom and how an estate in excess of one million dollars shall pass upon death?

How and when did Congress derive the right or the power to limit the accumulation of wealth, or, which amounts to the same thing, to limit the amount that persons dying shall transmit to descendants or successors? Or to interdict the right of descendants or successors to take or succeed in the case of an estate above a certain amount? How and when did Congress become possessed of the right or power to interdict the right and authority of the states to regulate the transmission of property regardless of amount, or to deny to the states the operation of their laws taken in respect thereto?

Clearly the exertion of such a power can find no justification in the right to tax accorded by the Constitution. The result cannot be avoided or concealed by calling the

exaction a *tax*. To hold that it is a tax is, as was said by Mr. Justice Harlan in *Western Union Tel. Co. v. Kansas, supra,* "to allow form to control substance."

It was precisely the situation which this tax presents, to-wit: the subversion by one authority through a mode of taxation of an exclusive power of another, which Mr. Chief Jusice Marshall inveighed against in *McCulloch v. Maryland, supra,* when he said "that the power to tax involves the power to destroy." As Mr. Justice White remarked in *Knowlton v. Moore*:

> "This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein."

Knowlton v. Moore dealt with a tax on legacies and distributive shares;—a tax which from its nature might follow naturally and properly the definition of those interests perforce of state regulation previously exercised, in full heed of the elementary rule "that when the constitutionality of a statute is assailed, if the statute is reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is the plain duty to adopt that construction which will save the statute from constitutional infirmity." Here we are confronted with the proposition that this tax shall precede those interests and the authority by which acquired. *Knowlton v. Moore* can therefore stand as no authority which justifies an operation and effect different from that there under consideration.

Any contention that this tax may have valid operation and effect simply amounts to the assertion that two things not equal to the same,—one a power of regulation, and the other a power to tax,—are nevertheless equal to one another, which when reduced to the lowest denomination demonstrates its unsoundness.

(e) No power exists in either state or nation which involves the functions of one by the other.

Concerning the relation of the states to the Union and the Union to the states, Chief Justice Chase said, in *Texas v. White*, 7 Wall. 700:

> "Under the Constitution, though the powers of the states were much restricted, still, all powers not delegated to the United States, nor prohibited to the states, are reserved to the states respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the states in union, there could be no such political body as the United States.' *Lane v. Oregon*, 7 Wall. 71. Not only therefore, can there be no loss of separate and independent autonomy to the states through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.*" (*Italics ours.*)

From the analysis that has been made it is evident that the states are not indestructible in any proper sense

if Congress may constitutionally impose taxation, the necessary operation and effect of which is destructive of the power of the states to control their own internal affairs. By such means every faculty of the states, except the capacity to exist as political bodies merely, might be paralyzed or rendered useless so far as its exercise could benefit their citizens, or promote their welfare.

No power is given under our system to either state or nation, which involves the functions of one by the other. On no other principle can our dual government exist. It is essential to the preservation of our system of government that the line of demarkation between the delegated powers of Congress and the reserved powers of the states should be distinctly defined and scrupulously respected. This court has never hesitated, when a proper case was presented, to condemn the legislation of either one when it encroached upon the rights of the other. One of the most recent examples of this is the decision of this court in *Hammer v. Dagenhart*, 247 U. S. 251, holding the "child labor" legislation of Congress, Act of Sept. 1, 1916, prohibiting transportation of manufactured goods, the product of child labor, to be an invasion of the state's reserved powers. No greater service can be done the country by this great tribunal than the re-affirmation of this sound doctrine.

There is no purpose or thought to argue here that the United States may not tax the transmission or receipt of property by death as and when effected by state laws. The power so to do is fully acknowledged. The measures taken by the states do not tend to withdraw from the operation of the rightful power of Congress those subjects, but on the other hand, to produce definite subjects in a general and

uniform manner, which shall be open alike to the general taxing power of the states and the nation.

FOURTH

Though there may be a seeming exercise of the taxing power, the Act complained of is so arbitrary as to constrain to the conclusion that it is not the exertion of taxation, but a confiscation of property, or so wanting in basis for classification as to produce such a gross and patent inequality as to lead inevitably to the same conclusion.

The infirmity in a measure taken by one sovereignty which results in a burden upon or impairment of the power of another, necessarily affects the rights and interests of persons which depend upon that power. Thus a state enactment which in operation and effect burdens the power of Congress to regulate interstate commerce, subjects those coming within the purview of the particular enactment to unusual, and what are, as a necessary consequence, unlawful burdens. Indeed, it is the unlawfulness of the burden which demonstrates the impairment of the power concerned. *Galveston H. S. & A. R. Co. v. Texas, supra; Western Union Tel Co. v. Kansas, supra.* The one is the necessary consequence of the other.

Whether or not a particular measure taken by one sovereignty offends against the exclusive power of another, that measure may still possess independent infirmities,—as in the disregard of fundamental principles of taxation, or in disregard of limitations on the taxing power, or otherwise—which render it invalid. So, here this tax presents questions, whether viewed apart from or as a consequence of the one above considered respecting the burden upon or

impairment of the state's power, which concern the validity of the imposition.

(a) The subject of taxation is the "transfer," and necessarily involves the interests of the transferees.

Legitimate operation and effect of a taxation measure taken by Congress, in the nature of a death duty, requires that the tax depend upon a subject which shall have been introduced through the permission of the states, namely: a transfer or succession completed or consummated in the successors in the manner in which their rights have been measured and defined. This is but to say that the phenomenon which may be subjected to taxation is such only as the power put in exercise having regard to its limitations may legitimately have operation and effect upon.

By *subjects of taxation* is commonly understood, "the phenomena subjected to taxation," (Seligman, *Essays on Taxation*, p. 395); or as otherwise expressed, "the facts or things upon which taxes are imposed," (Bastable, *Public Finance*, p. 249).

The "pith and substance" of the Act is contained in Sec. 201, reading as follows:

> "* * * a tax * * * equal to the following percentages of the value of the net estate * * * is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act" * * *

What phenomenon is here subjected to taxation? The term "transfer" as used in transfer tax acts is held to be used in its ordinary sense, "which is, that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter," *Matter of*

Gould, 156 N. Y. 423. It is synonymous with "passing" or "change of title" or "change of possession," *Dixon v. Russell*, 78 N. J. L. 296. There being no appreciable difference in phraseology between the state transfer tax acts, generally modeled upon the New York Act, and the Federal Estate Tax Act, in the clauses respectively imposing the tax, nothing gives warrant to the view that "transfer" is used in the Federal Act in any sense other than its usual acceptation.

A transfer not only implies but necessarily involves a transferer, a transferee or transferees, and a subject transferred. The implication of the relation of predecessor and successor and of the existence of a succession is patent. To bring a case within the Act persons standing in the relation of successors must actually acquire under the specified circumstances something of value, capable of appraisal and possessing the attributes of property, for it is manifestly impossible to impose a transfer tax unless a transfer has taken place. Beneficial interests must therefore have arisen in the transferees through a death in order to constitute a transfer that may be taxable, and the Act so shows.

Sec. 202 provides that the value of the gross estate shall be determined by including: (a) all property of a decedent "which * * * is subject to distribution as part of his estate"; (b) all property of which the decedent has at any time made a transfer, or created a trust "in contemplation of or intended to take effect in possession or enjoyment at or after his death," and that all such transfers made within two years of death "shall unless shown to the contrary be deemed to have been made in contemplation of death"; and (c) all property "held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part there-

of as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

Further, Sec. 205, provides for a return by the executor of the value of gross estate, the deductions allowed, the value of the net estate and the tax payable thereon, requires the executor, if unable "to make a complete return as to any part of the gross estate of the decedent," to include in his return a description of such part and the name of every person holding *a legal or beneficial interest therein,* and upon notice from the collector such person shall in like manner make a return; and Sec. 208, provides that if the tax is paid by or collected from that part of the estate passing to or in the possession of any person other than the executor, such person shall be entitled to contribution "by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate."

Thus it is made plain by the various provisions, that the Act is predicated upon the existence of benefits which have arisen in persons standing in the relation of successors, since upon any other interpretation of the Act, no object can be presented upon which the language can operate.

The tax is not in terms imposed upon the net estate of every decedent dying after the passage of the Act, but is in terms imposed "upon the transfer of the net estate" of every such decedent. What is that "net estate"?

Sec. 201 provides the ascending scale of rates based, in the case of the lowest rate, on *"the amount of such net estate,"* and in the cases of the higher rates, on *"the amount by which such net estate"* exceeds one sum and does not exceed another.

Sec. 202 provides what shall be included in determining the value of "gross estate," as just mentioned.

Sec. 203 provides that the value of the net estate shall be determined, by deducting certain enumerated items and amounts from the value of gross estate.

The residue must be what is contemplated by the Act as "net estate," the transfer of which is taxed. Hence everything which shall be so valued as gross estate, and from or of which no deduction is made, must remain in the category and constitute "net estate." In other words, the construction of the Act requires that the terms "gross estate' and "net estate" where spoken of, shall consist of the very same things, which are valued for the purposes of the measurement of the tax. No other construction is possible or permissible, for the reason that there are no words in the Act which imply that any other result was intended.

It may be contended by the government that the tax is an *estate tax,* levied and imposed upon a subject different from that upon which state inheritance, succession or transfer taxes are imposed, and in consequence is a tax of different character. That contention rests on the assumption that the words "net estate" when coupled with "transfer" in the phrase, Sec. 201, *"upon the transfer of the net estate of every decedent,"* etc., of itself characterizes a different subject. Net estate is and can be nothing else than the aggregate of the benefits taken by the transferees after the execution of the trust imposed upon the executor (leaving out of view the sum expressly exempted by the Act from taxation, which by its presence or absence in any case only affects the amount of the tax). "The real interest passing is what remains after payment of debts and other charges." *Matter of Westurn,* 152 N. Y. 93. Net estate specifies a certain quantum, as distinguished from some other quantum, as,

for instance, "gross estate." It will not be disputed that "net estate" is the unit by which the tax is sought to be measured. But when that unit, which describes the quantity of the objects to be taken as the standard of measurement, is again employed in the same sentence, what element to the phenomenon of transfer has been added if any? That no element is added when its office is understood, is readily apparent from the following demonstration.

Let us suppose, that the Act were drawn to read:

> That a tax * * * equal to the following percentages of the value of the *net estate* * * * is hereby imposed upon the transfer of the *gross estate* of every decedent; * * *

or again:

> That a tax * * * equal to the following percentages of the value of the *net estate* * * * is hereby imposed upon the transfer of the *property* of every decedent; * * *

or still otherwise:

> That a tax * * * equal to the following percentages of the value of the *gross estate* * * * is hereby imposed upon the transfer of the *net estate* of every decedent. * * *

Is it not apparent that in all these cases the act or fact involved which alone gives rise to the tax is the same, namely: the transfer or transmission effected by death? Obviously, the tax in the first two cases is measured by a standard more restricted than the area over which the tax has operation. On the other hand, in the third case, the tax is measured by a standard less restricted than the area of the tax. The result must be only such a difference in

the amount of burden imposed upon the subject, or in the area over which the burden is spread, as there is difference between the measure and the area. Thus "gross estate" and "property" in the first and second cases and "net estate" in the third, merely mark the boundaries or dimensions of the field within which the tax imposed upon the occasion of the transfer of property by death operates; which is aptly described by the English judges and text writers as "the ambit of the duty." *Winans v. Atty. Gen.*, L. R. App. Cas. (1910) 27; or the "area of taxation," *Hanson's Death Duties*, 6th Ed. pp. 20 and 128, and *Soward L. & Pr. Estate Duty*, p. 4.

Now what is the subject of taxation in any or all the three supposed cases? Is it not at once apparent that when the same act or fact of transfer is involved, whether expressed in relation to "gross estate" or "net estate" or simply "property," that neither has changed the subject of taxation, nor substituted a different subject? The result is merely the expression of a different quantum of the same subject; or to give a more or less restricted ambit to the tax imposed.

Mr. Justice White said in the *Knowlton case*, p. 57:

> "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit, or the transmission or receipt of property by death which is the subject levied upon by all death duties."

Hence if the subject of all death duties be such, the mere specification of a quantum does not make a different subject.

That there may be no misunderstanding as to what is meant by the above quotation from *Knowlton v. Moore*, it

is proper to observe that what Mr. Justice White thus said respecting the subjects of all death duties preceded his discussion of the question of the respective powers of the states and of the national government to impose death duties, and had no reference to any restrictions or limitations that may rest upon the powers of either. The power to transmit exists as an attribute of property either perforce of ownership of property or is derived from the states in virtue of their regulation, and a tax upon it must be exposed to the charge of being a direct tax upon property, or of being a burden on the power of the states. *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U. S. 522, 530; *Dibrell vs. Lanier*, 89 Tenn. 497, 12 L. R. A. 70.

That the subject of the tax in the Knowlton case was not the "power to transmit," is made clear by Mr. Justice White's discussion of the respective powers of the states and national government with respect to death duties in that case, and is made still clearer by his own explanation of the Knowlton case, in his dissenting opinion in *Snyder v. Bettman*, 190 U. S. 249, 258, where he said:

> "It was not only directly held in *Knowlton vs. Moore* that the tax was on the transmission or the receipt of the legacy occasioned by death, and was therefore not on the property, not on the estate, not on the executor, but that it was also held to be a burden imposed on the recipient."

The question is wholly unimportant here for neither by construction of the Act, nor by any legitimate operation as above shown, may the Estate Tax be considered as imposed upon the power to transmit.

"The character of a tax, or its validity, is not determined by the mode adopted in fixing the amount." *Maine*

v. Grand Trunk R. R. Co., 142 U. S. 217. That principle is one of frequent application, *St. Louis v. United Rys.*, 263 Mo. 387, 444; *Kane v. Titus*, 81 N. J. L. 594, and was lately employed in *Flint v. Stone Tracy Co.*, 220 U. S. 107, as the facts show.

It follows, that the measurement of the tax by the value of the net estate, and the definition of the area of the tax, do not determine either the character or the subject of the tax.

Resort to the sub-title of the Revenue Act of 1916, to-wit: "Estate Tax" throws no light toward a construction that the tax imposed is upon the interest that ceased on death, as distinguished from a tax upon the interest which someone takes on a death, in the face of the express language that the tax is "imposed upon the transfer" which is the identical thing that the states have undertaken to consummate in successors perforce of their regulations.

For the reasons advanced, the term "transfer" comprehensively embraces the several interests or benefits of all successors, and the imposition of the tax upon the transfer certainly involves and affects those interests or benefits. And it follows, perforce, that the imposition of the tax "upon the transfer" results in taxation of the successors in respect of their several interests or benefits in the transfer, or in taxation of those interests or benefits *en masse*.

(b) The measurement of the tax by the mass of the net estate produces profound inequality between persons circumstanced alike, or standing in the same relation.

An heir at law takes by descent "an undivided interest in the whole estate," *Matter of Ramsdill*, 190 N. Y. 492, 496.

A legatee or devisee takes a specific interest in the estate. The Act makes no express reference to the persons to whom property passes nor to the amount of benefit taken by them. The tax is levied indifferently whether they are relatives of decedent or strangers in blood. The tax is not made to depend upon the way in which the property passing is split and distributed in virtue of the states' power.

Hence, in the case of intestate estates the share of each successor will stand diminished not in accordance with the value of his interest, but in the proportion that the value of his interest bears to the value of the whole estate passing. The amount of the burden to be borne bears no relation to the value of the interest, the acquisition of which alone makes taxation possible, but to something wholly apart, accidentally existing. In the case of testate estates the same result must follow, unless even greater inequality is produced by placing the entire burden upon the residuary estate "in ease of the rest," which is the necessary effect of recent decisions in some states. *Plunkett v. Old Colony Trust Co.*, 233 Mass. 471, 124 N. E. 265, s. c. 7 A. L. R 696; *In re Hamlin*, 226 N. Y. 407; 124 N. E. 4, 7 A. L. R. 701, and note.

Thus, this tax, if to have operation, presents a similar situation which the Act of 1898 would have produced, had not the reference therein to "legacies and distributive shares" enabled differentiation of that tax from one measured by the mass of the estate, and a construction to which the present Act is not for the same reasons susceptible. An apparent purpose of Congress in this enactment, was, it seems from the framework of the Act, to raise the question suggested and severely condemned in *Knowlton v. Moore*, not necessary to decision for the reasons mentioned.

By concrete illustration the workings of the tax may

be shown. The table contained in the appendix gives the amount of the tax on each block of an estate up to $10,000,000.00.

Thus, if A is entitled to a distributive share, whether by will or descent, of $50,000, from an estate subject to the minimum rate, that share will stand diminished one per cent, or $500.

If B is entitled to a distributive share, whether by will or descent of equal amount, $50,000, from an estate of $10,000,000, that share will stand diminished eight and 41-100 per cent, or $4205.

The distributive shares are precisely equal in amount and in value. The interest of either A or B in the respective estates is determined by the value of his share, and not by the value of the estate. Nevertheless diminution is suffered by one from so arbitrary, capricious and accidental a thing as if determined by count of the number of beans in a bag. The share of one is diminished approximately eight and one-half times as much as the other's, for a benefit of equal value. In other words, the same or equal thing is considered worth one dollar to one man and eight and one-half dollars to another.

Mr. Justice White in *Knowlton v. Moore*, pp. 74, 76, speaking in reference to the contention that the tax was laid on or measured by the mass of the estate said:

> "Must it not be considered that the statute provided for no such discordant and unjust discrimination? * * *
>
> "In other words, the construction (contended for against the tax) proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is

that the house of A, which is only worth $1,000, may be taxed, but the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying and leaving an estate of $10,500, bequeaths to a hospital $10,000. The rate of tax would be 5 per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000 and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of the tax $1250. It would thus come to pass that the same person occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

The New York Legislature in 1910 proposed to amend the law of that state so as to measure the tax by the volume of the estate. In his veto of that measure, Governor Charles E. Hughes, (*Public Papers of Gov. Hughes*, 1910, pp. 104, 105, 184) spoke as follows:

"The objection lies to the method of graduation. The progressive rate appears to depend not upon the amount of property or interest received by the individual transferee, but upon the size of the whole estate passing to those who are not exempted from the provisions of the law. * * *

"The bill provides that the tax imposed with respect to collateral relatives and strangers shall be seven per cent if the value of the property does not

exceed $100,000; eight per cent if it exceeds $100,000 and does not exceed $250,000, and ten per cent if it exceeds $250,000. In the case of those within section 221 of the Tax Law, including, father, mother, husband, wife, child, brother and sister, the tax of one per cent is imposed if the property is of the value of $10,000 or more and does not exceed $100,000, two per cent if it exceeds $100,000 and does not exceed $250,000; and five per cent if it exceeds $250,000.

"Hence, under this bill it would seem that persons who stand in the same relation to two decedents and receive legacies of precisely the same amount will pay inheritance taxes at different rates according to the size of the estate left by the decedents respectively.

"This method of graduation has been condemned as opposed to sound policy." * * *

The claim that such a tax may be measured by the "net estate," or the mass of the property passing presents for consideration the fundamental question having two aspects: (1) whether a tax so imposed is laid "with reference to the ability of the person upon whom the burden is placed to bear the same"? and (2) whether in the mode adopted there is not entirely wanting a proper basis for classification?

(c) The tax is not laid with reference to the ability of the person upon whom the burden falls to bear the same, because there is no sense of proportion between the burden and the value of the benefit.

In *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194, 203, this court, speaking in reference to sound legislative aim: The requirement that every citizen shall

contribute in proportion to his property, and the avoidance of unequal burdens, used the following language:

> "As said by Adam Smith in his *Wealth of Nations*, Book V. Chap. 2, pt. 2, p. 371: 'The subjects of every state ought to contribute towards the support of the government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation.'"

Amplifying those principles, Mill, *Political Economy*, Book V, ch. II sec. 2, said:

> "For what reason ought equality to be the rule in matters of taxation? For the reason that it ought to be so in all affairs of government. * * * If any one bears less than his fair share of the burden, some other person must suffer more than his share, and the alleviation to the one is not, *caeteris paribus*, so great a good to him, as the increased pressure upon the other is an evil. Equality of taxation, therefore, as a maxim of politics means equality of sacrifice."

Rates of taxation progressing in accordance with the benefit derived have long been features of inheritance or succession and income tax laws. "Taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government" was said by Mr. Justice White in *Knowlton v. Moore*. Ability to pay or "equality

of sacrifice" in respect to governmental burdens, is nothing but the application of the principle that each individual should be held to help the state in proportion to his ability to help himself. Seligman, *Essays on Taxation,* 21, An invidual's ability to help himself can be measured or translated only in terms of value. In *Monticello Distilling Co. v. Mayor,* 90 Md. 416, cited in *Cooley on Taxation,* 3rd Ed., 12, the court says:

> "The value of the things owned fixes the measure of the owner's ability to contribute in taxes towards the support of the government. This is an axiom of political economy no less than a fundamental provision of our organic law."

The theory upon which progressive rates are based, is, the greater the individual benefit derived the greater is the ability to pay. Or, as says Seligman again, p. 82, "So far as a man receives special opportunities from the community, which undoubtedly increase his ability to pay, they should be taken into account in framing any scheme of taxation." To justify progression in taxes some sense of proportion between the burden and the value of the benefit is necessarily involved. Manifestly to measure the burden not by the value of the benefit derived, but by a wholly distinct and separate thing is to say that "ability to pay" arises from something else than the qquantum of benefit. To so adjust the burden results in nothing but disproportion in sacrifice. *State ex rel, Garth vs. Switzler,* 143 Mo. 287, 40 L. R. A. 280; *state ex rel. Swartz v. Ferris,* 53 Ohio St. 314, 30 L. R. A. 218.

From the practical workings of this tax it clearly appears that it is not measured by the individual benefit which is actually involved and necessarily implied by the

imposition of the tax "upon the transfer" as has been hereinbefore shown, but by something which by pure accident of circumstances penalizes individuals in respect to their benefits with a varying severity.

(d) The Act is entirely wanting in proper basis for classification and sensibly violates fundamental principles underlying just taxation in the utter disregard of the interests of persons patently present in the subject taxed.

The rule of uniformity lying at the basis of every just system of taxation, requires the same means and methods to be applied impartially to all constituents of each class, so that the burden bears equally and uniformly upon all persons in similar circumstances. *People ex rel. Hatch v. Reardon* 184 N. Y. 431, aff. 204 U. S. 152; *Magoun v. Illinois Trust & Savings Bank, supra; Hayes v. Missouri,* 120 U. S. 68; *Barbier v. Connolly,* 113 U. S. 27; *Cooley on Taxation,* 3rd Ed. 260. The test of propriety of classification is whether there be "some difference which bears a reasonable and proper relation to the attempted classification and is not a mere arbitrary selection." *Gulf, Col. &S. F. Ry. Co. v. Ellis,* 165 U. S. 150; *Magoun v. Illinois Trust & Savings Bank, supra; Black v. State,* 113 Wis. 205.

A proper basis for an attempted classification, as is said in *Gulf Col. & S. F. Ry. Co. v. Ellis, supra*:

> "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." * * *

The Act does not classify by arranging according to the value of the separate rights and interests of persons, which such "transfer" to them necessarily effects, but by arranging according to accident. While it places the amount of all "net estates" exceeding one sum and not exceeding another, in a class, still the burden does not bear equally and uniformly upon all persons in like relation or similar circumstances. Without method or order the burden bears heavily upon some and lightly upon others circumstanced alike.

Each class consists simply of a specified amount of estate, and the only difference or distinction is in volume. Who are the constituents of each class but the persons in whom the "transfer of the net estate" effects individual rights and interests having relation one with another in equality, degree, amount or character? Is there equality within the classes when the members of each class are not treated alike, that is to say: when all who inherit $10,000 are not treated alike—all who inherit any other sum are not treated alike? What difference is there between a legacy or distributive share of $10,000 from an estate within the exemption and a like legacy or distributive share derived from a "net estate" of $500,000, or of $1,000,000 or of $10,000,000? What difference is there bearing "reasonable and proper relation to the classification" when nothing short of the fact that the legatee or distributee has become entitled to that sum, enables the tax to have operation? It comes but to this, that one man's burden is greater or less depending upon circumstances beyond his control, and that burden may be, by reason of the progression in rates, vastly disproportionate to the burden borne by another in respect to a thing of the same or equal value.

It was on this ground that similar classifications made

for inheritance taxation by the states, involved in the cases: *State ex rel. Garth v. Switzler,* 143 Mo. 287, 40 L. R. A. 280; *State ex rel. Swartz v. Ferris,* 53 Ohio St. 314, 30 L. R. A. 218; *State ex rel. Sanderson v. Mann,* 76 Wis. 469, and *State v. Gorman,* 40 Minn. 232, were condemned.

Where separate rights and interests in individuals alone give rise to a tax is it any less arbitrary to erect a classification for the purpose on the basis of the value of the net estate from which derived, than to base it on the census count of the community in which the decedent was domiciled? It was held in *Clark v. Titusville,* 184 U. S. 329, that a license tax imposed upon persons carrying on certain occupations, regulated by the amount of the sales was not improper classification for it did not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liability imposed." But what could be said of such a tax if imposed upon all persons carrying on the particular occupation in a five-story building, regulated by the amount of aggregate sales? Or if all those in a ten-story building severally doing an equal or less business should nevertheless be subjected to a higher rate?

The power to make classification of objects of taxation springs from the power to tax. Hence Congress, which may only tax the transmission of property on death when the states' power thereover shall have been expended, must base its classification upon that which has been produced by the expenditure of the states' power. In other words when Congress is enabled to tax a definite thing, its classification must have relation to that thing, else an unjust and unequal burden must result. As is shown by cases heretofore cited, to-wit: *Western Union Telegraph Co. v. Kansas* 216 U. S. 1; *Gloucester Ferry Co. v. Pennsylvania,* 114 U.

S. 196; *Philadelphia & S. Mail Co. v. Pennsylvania*, 122 U. S. 326; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298; *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217; and *Fargo v Hart*, 193 U. S. 490, subjects of taxation were presented lawfully within the power of the states, but the classification of corporations engaged in interstate commerce in accordance with the amount of entire capital stock, amount of gross earnings derived from all sources or the amount of dividends paid from all earnings, resulting in a burden on the interstate commerce power also, as a necessary consequence, resulted in unlawful burdens on the subjects taxed, because the standards of measurement bore no proper relation to those subjects.

The classification which the law contemplates, *is classification of the subjects or objects of taxation*, or the phenomena subjected to taxation, not a classification of standards or modes of measurement having no just relation to the subjects or objects of taxation. *Home Ins. Co. v. New York*, 134 U. S. 594; *Magoun v. Illinois Trust & Savings Bank, supra; Cooley on Taxation* 76; *Billings v. Illinois*, 188 U. S. 97. Were it not so the effect must be to tax, either the thing seized upon to measure the tax or the definite thing which only may be taxed, arbitrarily and unequally as between persons in the same circumstances.

A variety of illustrations of the invalidity of the classifications here involved is presented by the following cases. *People v. Raynes*, 120 N. Y. Supp. 1053, Aff. 198 N. Y. 539, respecting a license fee charged on persons selling convict-made goods where the classification was held invalid because based upon "the origin of the goods dealt in, without regard to the quality or character or nature of the goods themselves." Also see *People ex rel. Farrington v. Mensching*, 187 N. Y. 8; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375;

Danville v. Shelton, 76 Va. 325; *Bangor's Appeal*, 109 Pa. St. 79; *Re Ruan St.*, 132 Pa. St. 257; *Commonwealth v. Patton*, 88 Pa. St. 258.

Perfectly equal taxation will remain an unattainable good as long as laws and government and man are imperfect. *Grim v. School District* 57 Pa. St. 433, but, as said Mr. Justice Field in *Stanley v. Supervisors*, 121 U. S. 535, 550:

> "The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity * * * is complied with, *when designed and manifest departures from the rule are avoided.*" (Italics ours.)

And said Mr. Justice Brewer, speaking of the Fourteenth Amendment, in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 110:

> "That constitutional provision does not, it is true, invalidate legislation on the mere ground of inequality in actual result. Tax laws, for instance, in their nature are and must be general in scope, and it may often happen that in their practical application they touch one person unequally from another. *But that inequality is something which it is impossible to foresee and guard against*, and therefore such resultant inequality, in the operation of a law does not defeat its validity." (Italics ours.)

In a classification for governmental purposes there cannot be an exact inclusion of persons and things, *Magoun v. Illinois Trust & Savings Bank, supra.* But, because an exact inclusion of persons and things may be unattainable, it affords no justification for an arbitrary and purposeful exclusion of persons and things in making a classification.

Where those persons and things are patently present in the subject seized upon, and, indeed, without which there would be no subject, their exclusion can only be ascribed to a direct and intentional purpose to make the tax unequal in its operation, or to an utter disregard as to its effect. That a tax upon property passing to persons in accordance with state statutes, when not proportioned to the amount severally passing to them, will not cause an inequality and discrimination, which is direct, immediate and must be foreseen, belies intelligence.

Undoubtedly the authority possessing the right to limit the amount of property that its citizens may dispose of on death, may make such classifications as are necessary to that end. It may have regard for the "interest which ceased on death" and none for "the interest to which some one succeeds on the death," and in consequence may measure the tax by the volume of property passing from decedents, erect such classifications in respect to amount, and provide such progressive rates as it may determine. Such in principle is the English Estate Duty. We have refrained hitherto from drawing any comparison between that duty and the Estate Tax, for were it to be shown that there is a similarity in the general scheme of both, no analogy could be drawn in consequence, either in principle, operation, effect or otherwise, because the powers from which the enactments proceed, differing in nature, extent or limitation, permit no analogy to be drawn between them. If the English Parliament, untrammelled by limitations upon its power, shall be moved by considerations of public policy to impose a tax, as it has, directly upon property passing from decedents on the occasion of death, Congress, possessing the power to tax, within certain limitations and with restrictions upon exercise requiring regard to be shown for the

independent and exclusive power of another sovereignty, may not impose a tax of like nature, operation and effect. There is a vast difference between a power which enables taxation of property *as property freely and directly*, and makes that tax accrue on death (and such unquestionably is the nature of the English Estate Duty; *Winans v. Atty. Gen.*, L. R. App. Cas. (1910) 27; *Cowley v. Commissioners of Inland Revenue*, L. R. App. Cas. (1899) 198; *Atty. Gen. v. Beech*, L. R. App. Cas. (1899) 53, 56; *Hanson's Death Duties*, 6th Ed. 1, 2); and a power though vast and searching in extent, which from its limitations, may only resort to the *passage of property*, or the "transmission or receipt of property" as and when introduced and permitted by another distinct sovereignty. There must be an equal difference in the measures proceeding from the respective powers, when legitimately taken.

(e) The Fifth Amendment stands as a condition upon which the power to tax may be exercised, and because of the inequality and capricious operation produced, the Act must stand condemned as in violation of that amendment.

Equally and in the same respects, the "due process of law" clause in the Fifth Amendment restrains the action of Congress, as that clause in the Fourteenth Amendment restrains the action of the states. In *Hurtado vs. California*, 110 U. S. 516, 534, Mr. Justice Mathews, in construing the clause as used in the Constitution, referring to the Fifth Amendment, said:

> "The conclusion is * * * irresistible, that when the same phrase was employed in the Fourteenth

Amendment to restrain the action of the States, it was used in the same sense and with no greater extent."

The same meaning thereto is ascribed *in re Kemmler*, 136 U. S. 436. And in *Duncan vs. Missouri*, 152 U. S. 377, 382, Chief Justice Fuller in considering when due process of law is secured, said:

> "Due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

which was quoted approvingly in a review of a number of cases in *Connolly vs. Union Sewer Pipe Co.*, 184 U. S. 540, 559, 560.

Speaking further in *Knowlton v. Moore*, respecting the contention that the tax there concerned was measured by the mass of the estate, Mr. Justice White said, p. 77:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below."

What is a tax? That question was answered by the court speaking through Mr. Justice Field in *Pollock v.*

Farmers' Loan & Trust Company, 157 U. S. 429, 599, as follows:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

Cooley in his work on *Constitutional Limitations*, after treating upon the extent of the taxing power, points out the essential elements in all just taxation, which if disregarded will not leave the citizen without redress, "even though there be no conflict with express constitutional inhibitions," and thus sums up the matter, at p. 598 (6th ed.), as follows:

> "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

The extent to which taxation may be exercised is in its very nature unlimited, unless restricted in some particular case or respect by constitution or statute. Where there is a lawful power to impose a tax its imposition may not be treated as without the power because of the destructive effects of the exertion of the authority. *McCray v. United States, supra.* The remedy for abuse in the exercise of a lawful power lies "not in the abuse by the judicial authority of its functions, but in the people." *McCray v. United*

States, supra; Gibbons v. Ogden, supra; Champion v. Ames, 188 U. S. 321; and *Spencer v. Merchant,* 125 U. S. 345.

While the *exercise* of the lawful power of Congress to tax is unlimited and may not be restricted by the courts, nevertheless limitations, or what are essentially such, rest upon the power itself, its use or which prevent abuse, aside from the modes or manner in which it may be exerted. The power to tax is said to extend to all objects, excepting exports, nevertheless the instrumentalities of the states employed to carry into operation their powers are not such objects to which the power to tax extends, *Ambrosini v. United States,* 187 U. S. 1; *United States v. Baltimore & Ohio R. R. Co.,* 84 U. S. 322, nor the officers of the state, *Collector v. Day,* 11 Wall. 113. Neither is the power to tax permitted to interfere with regulations of subjects taken or made by the states respecting matters under their exclusive control. *Knowlton v. Moore, supra; Hammer v. Dagenhart,* 247 U. S. 251; *Pervear v. Massachusetts,* 5 Wall. 475; *License Tax Cases,* 5 Wall. 462. For the reasons which have been advanced, and upon the authorities which have been cited in support, that power to tax does not extend to any subject in so far as to allow the imposition directly of arbitrary and unequal burdens upon persons.

Either these stand as restrictions or limitations on the power to tax, "arising from those fundamental conceptions of free government" underlying our constitutional systems, state and national, or there is an entire absence of power to tax objects in certain cases, and it seems immaterial to consider which. Are there no "express constitutional restrictions" from arbitrary deprivation of life or liberty or arbitrary spoliation of property on the part of Congress?

The Fifth Amendment may not be a limitation upon the taxing power of congress conferred by the Constitution, but

in the language of Mr. Justice Field in *United States v. Jones*, 109 U. S. 513, it must stand as "a condition upon which the power may be exercised."

Chief Justice White in *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1, 24, said:

> "The Constitution does not conflict with itself by conferring upon the one hand, a taxing power, and taking the same power away by the other." * * *
> But, said he, continuing:
> * * * "this doctrine would have no application in a case where, although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation, but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

In concluding the court's opinion in *Knowlton v. Moore, supra*, Mr. Justice White said:

> "If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so."

The operation and effect of the Act is so arbitrary, as has been shown, as to constrain to the conclusion that it is

not the exertion of taxation, but a confiscation of property; and is so wanting in basis for classification, producing such gross and patent inequality, as to lead inevitably to the conclusion that it is an arbitrary spoliation of property.

CONCLUSION

For the reasons which have been advanced it is respectfully urged that the Estate Tax provided in the Revenue Law of 1916 is invalid in a constitutional sense on the grounds: (1), that its operation and effect is to cast a burden upon and usurp the plenary power of the states to regulate the transmission of property on death; and (2), that it transcends those principles which lie as the basis of constitutional and free government, and is an exertion of power inhibited by the Fifth Amendment.

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APPENDIX

Table for Computing Estate Tax.

Net Estate.			Sept. 9, 1916, to March 2, 1917, Inclusive (Revenue Act of 1916).		
Exceeding	Not Exceeding	Amount of Block	Rate Per Cent	Tax	Total
$........	$ 50,000	$ 50,000	1	$ 500	$ 500
50,000	150,000	100,000	2	2,000	2,500
150,000	250,000	100,000	3	3,000	5,500
250,000	450,000	200,000	4	8,000	13,500
450,000	750,000	300,000	5	15,000	28,500
750,000	1,000,000	250,000	5	12,500	41,000
1,000,000	1,500,000	500,000	6	30,000	71,000
1,500,000	2,000,000	500,000	6	30,000	101,000
2,000,000	3,000,000	1,000,000	7	70,000	171,000
3,000,000	4,000,000	1,000,000	8	80,000	251,000
4,000,000	5,000,000	1,000,000	9	90,000	341,000
5,000,000	6,000,000	1,000,000	10	100,000	441,000
6,000,000	7,000,000	1,000,000	10	100,000	541,000
7,000,000	8,000,000	1,000,000	10	100,000	641,000
8,000,000	9,000,000	1,000,000	10	100,000	741,000
9,000,000	10,000,000	1,000,000	10	100,000	841,000
10,000,000	....	....	10	....	....

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

NEW YORK TRUST COMPANY AND ALBERT W. Pross, as executors of the last will and testament of J. Harsen Purdy, deceased, plaintiffs in error,
v.
MARK EISNER.

No. 286.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

In all of the briefs filed in this case, stress is laid on the line of cases holding that a tax so levied by a State as to be a burden upon interstate commerce is, to that extent, a regulation of interstate commerce and an encroachment upon the exclusive power of Congress over that subject. From this, it is argued that a tax upon the devolution of property occasioned by death is a regulation of descent and distribution which, it is said, belongs exclusively to the States.

A moment's consideration, however, will show the fallacy of this contention. The principle upon which the cases referred to rest, in fact, fully sustains the

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right of the Federal Government to impose death duties.

It may be assumed that, before the formation of the Federal Government, the States possessed plenary power over the subjects both of taxation and of interstate commerce as well as the descent and distribution of property. It is now settled that the grant of power to Congress to regulate interstate and foreign commerce was exclusive. This grant was, therefore, a limitation upon the State's power of taxation to the extent that such taxation could be regarded as a regulation of interstate commerce. It is not doubted that imposing a tax so as to burden interstate commerce amounts to a regulation. Hence, it was inevitable that such a tax should be held invalid.

If we assume that a death duty of any kind amounts to a regulation of the descent and distribution of property, and apply the rule or principle applied in the cases above referred to, the obvious conclusion is that the Federal Government possesses the power of regulation to that extent. The power to impose taxes is granted to Congress in the most sweeping language, and, as shown in the original brief, applies to all the usual subjects of taxation, which includes the transmission of property from the dead to the living. This power, as has been repeatedly held, is subject only to such limitations as are imposed by the Constitution of the United States itself. If the levying of death duties amounts to a regulation of

the descent and distribution of property, the power to regulate, to that extent, has been expressly conferred upon Congress. Of course, the primary power of the States to regulate was not taken away. But just as the grant of the power to regulate commerce operated as a limitation upon the power of the States to tax, so the grant of the power to tax operates as a limitation, to that extent, upon the power of the States to regulate descent and distribution. The only difference lies in the fact that the power of the Federal Government to tax is not an exclusive power.

The grant of power to tax, for the purposes of the Federal Government, did not limit or impair the power of the State government to tax for its purposes. Each Government is free to tax the same subject matter for its own purposes. The limitation of the State's taxing power in the case of interstate commerce comes from its exclusion, by the Constitution, from the right to regulate, in any form, such commerce. In the case of the devolution of property no such limitation is placed upon the power of Congress. The result is that, so far as the imposition of death duties may be said to amount to a regulation of the devolution of property, the power to regulate has been expressly granted to Congress. The State may regulate, as it sees fit, the right to transmit or to receive property. And the imposition by the Federal Government of a tax which reduces the amount to be either transmitted or received does not impose

any burden or restriction upon *the right of the State.* At most, it merely imposes an additional regulation upon the right of the individual to either transmit or receive. And the right to impose this additional regulation is necessarily included in the power to tax.

There is nothing new or startling in this view of the law. It is the view upon which taxation by the Federal Government, from the beginning, has been based. Indeed, it has constantly been held not only that a tax is not invalid because imposed upon something which is within the primary power of a State to regulate, but that the power to tax necessarily implies the power to make such regulations as may be appropriate for the collection of the tax. Thus, practically the whole system of internal revenue laws has been applied to subjects which are primarily within the control of the States. Before the adoption of the eighteenth amendment Congress had no independent power to regulate the manufacture of or traffic in intoxicating liquors. This was a subject which belonged to the police powers of the State. A State had the power to determine whether liquor should be either manufactured or sold within its bounds. This was a subject within its control in the same sense that the devolution of property is within its control. Yet, for many years, a large part of the revenues of the Federal Government were derived from taxes on the manufacture and sale of intoxicating liquors.

The States, in the exercise both of their police and taxing powers, licensed the manufacture and sale of liquors. In this way, they imposed regulations upon the business. When Congress saw fit to impose the same kind of taxes, it merely added another regulation which the power to tax gave it the right to impose. The same is true of the tax on the manufacture and sale of tobacco, oleomargarine, narcotics, and practically every internal revenue tax which has been imposed by Congress. It is for this reason that Federal taxes on conveyances, bank checks, admissions to theaters, the sale of soft drinks at soda fountains, and the numerous other excise taxes have always been sustained. Moreover, it is not only the right to regulate which results from the mere imposition of the tax that exists in Congress. Having imposed the tax, it has the implied power to prescribe such regulations as it deems necessary to secure collection. A striking illustration is found in the numerous regulations which have always been applied to the manufacture and sale of intoxicating liquors. A still more striking illustration is found in the drastic restrictions thrown around the sale at retail of narcotics, which has been sustained by the court as within the implied powers of Congress. Indeed, if, in the exercise of its taxing power, Congress had not the power to regulate, to the extent necessary to collect its taxes, subjects within the primary control of the States, the power of Congress to impose excise taxes would be limited

in the extreme. Not much would be left except the right to levy such taxes upon interstate and foreign commerce.

It is suggested in a brief filed on behalf of one of the States that this tax withdraws from the State a large amount of property which it has the right to tax. This suggestion arises from the fact that the Federal tax is measured by the amount of the estate to be transmitted and is taken out before distribution, with the result that the amount subject to State succession taxes is decreased to that extent. The fallacy in this argument is that the act of Congress does not restrict, in any degree, the power of the State to impose death duties as it sees fit. It may measure these death duties as to it seems proper. It may so frame its tax laws that the death duties which it exacts shall be measured not by what is finally received, but by what is to be transmitted before the deduction of the Federal tax. In other words, the Federal Government and a State government may each, in the exercise of its independent taxing power, impose a tax upon exactly the same subject matter. Each may levy a tax on the same income without allowing deductions for the amount paid by the other. Each may impose death duties in the same way.

Respectfully submitted.

William L. Frierson,
Solicitor General

April, 1921.

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